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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1615.~~ 1024

THE LOUISVILLE WATER COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM CLARK, SHERIFF OF JEFFERSON COUNTY, KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED FEBRUARY 13, 1891.

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1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorables the judges of the court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 9th day of October, A. D. 1890, Chief Justice William Holt and Judges Caswell Bennett, William S. Pryor, and Joseph A. Lewis, sitting.

WM. CLARK, Sheriff, Appellant,
vs.
LOUISVILLE WATER CO., Appellee. } Appeal from the Louisville Law & Equity Court.

Be it remembered that heretofore, on the 13th day of December, A. D. 1887, the appellant, William Clark, sheriff, by Helm & Bruce, his attorneys, filed in the office of the clerk of the court of appeals of Kentucky a transcript in words and figures following, to wit:

COMMONWEALTH OF KENTUCKY,
Louisville Law & Equity Court, } *ss:*

LOUISVILLE WATER CO.
vs.
WM. CLARK, Sh'ff, &c.

Pleas before the Honorable Sterling B. Toney, judge of said Louisville law & equity court, at the court-house, in Louisville, Ky., on the dates hereinafter mentioned.

Be it remembered that heretofore, to wit, on the 1st day of October, 1887, came plaintiff, by Lane & Burnett, att'ys, and filed
2 in the clerk's office of the court aforesaid its petition in equity and 3 exhibits. Said petition is in the words and figures following:

Petition.

Louisville Law & Equity Court.

THE LOUISVILLE WATER COMPANY, Plaintiff,
vs.
WILLIAM CLARK, Sheriff of Jefferson County, Defendants.

The plaintiff, The Louisville Water Company, says that it is a body corporate; that it was created and organized under and in pursuance of an act of the General Assembly of the Commonwealth of Kentucky, approved March the 6th, 1854, *an* entitled "An act to incorporate the Louisville Water Company," and various subsequent acts of the General Assembly supplementary thereto and amendatory thereof.

This plaintiff says that by its said charter it was invested with right, power, and authority to construct, establish, and maintain within or near the city of Louisville reservoirs, engine-houses, pumps, pumping machines, machinery, and engines necessary to

constitute a completely equipped water works; to construct and maintain under and along the public ways of the Commonwealth water pipes and mains connecting all parts of the city of Louisville with its reservoirs; to construct and maintain water pipes and mains connecting the reservoirs of this plaintiff with the Ohio river; to acquire by purchase or writ of *ad quod damnum*, take, and hold, in fee simple or for a less estate, any and all lands necessary for the convenient management of the concerns of this plaintiff to
3 the end that this plaintiff might at all times be able to furnish and might furnish an abundant supply of pure, fresh, and wholesome water to the inhabitants of the city of Louisville, *that* and to the end that this plaintiff might be able to and might furnish and supply an abundance of water to flush and cleanse the public ways in the city of Louisville, and to the end that this plaintiff might be able to and might furnish a supply of water to the public fire-cisterns and public fire plugs and hydrants in the city of Louisville as a protection against the loss or destruction by fire of public and private property in the city of Louisville.

This plaintiff says that in pursuance of the provisions of its charter and in the exercise of the rights and powers thereis conferred upon it and *is* indispensable and necessary for the convenient management of its concerns, and to carry out and effectuate the purposes of its incorporation *its incorporation*, it did, long prior to the first day of January, A. D. 1880, acquire in fee simple and has since held and owned and now holds and owns the following-described real estate, to wit:

First. A lot of land, with the improvements thereon, in the city of Louisville, in the State of Kentucky, commencing on the east side of Third street, at a point two hundred and — seven feet and six inches north of and distant from the northeast corner of the intersection of Third and Walnut streets, thence north along and having a front on the east side of Third street of fifty-six feet and six inches north of and distant from the northeast corner of the intersection of Third and Walnut streets; thence north along and having
4 a front on the east side of Third street of fifty-six feet and six inches and extending back eastwardly the same width in lines parallel with the direction of Walnut street two hundred and thirty feet to an alley.

The second. A lot of land, with the improvements thereon, in the city of Louisville, in the State of Kentucky, commencing on the west side of the first alley east of and parallel with Third street and running from Green street to Walnut street, and at a point two hundred and ninety-four feet north of and distant from the north line of Walnut street; thence north along and having a front on the west side of said alley of twenty feet and extending back the same width westwardly in lines parallel with the direction of Walnut street one hundred and twenty feet.

Third. A tract of land, with the improvements thereon, in the city of Louisville, in the State of Kentucky, which tract contains two hundred and forty-five acres; is in the Edwards Pond precinct; extends from the Shelbyville turnpike to the Ohio river, and adjoins

the land of A. C. Arteburn and R. Waters. This plaintiff says that on and before the 1st day of January, A. D. 1880, it constructed and has continuously since maintained and now keeps and maintains on the lot of land last herein described and referred to as the third two reservoirs, a coal-house, stand-pipe and tower, engine-house, chimneys, pump station, fencing, and other improvements; that on and before the first day of January, A. D. 1880, it constructed and has since continuously maintained and now maintains a pipeway and pipes leading from and connecting its said reservoirs with and
5 to the Ohio river, and pipeways and pipes leading from and connecting its said reservoirs in and under the public ways with all parts of the city of Louisville.

This plaintiff says that in the acquisition of the lands hereinbefore described and in the construction and maintenance of the said reservoirs, coal-house, stand-pipe, tower, engine-house, chimneys, pump station, fencing pipe, and pipeways and other improvements, all of which are now and have continuously been prior hereto necessary and indispensable to the efficient management of its concerns and to the purposes and objects of its incorporation, it has expended and laid out over two million and five hundred thousand dollars.

This plaintiff says that it did on and before the first day of January, A. D. 1880, that it has continuously ever since, and that it does now furnish an abundant supply of pure, fresh, and wholesome water to the inhabitants of the city of Louisville; that it did on and before the first day of January, A. D. 1880, and has continuously since and does now furnish an abundant supply of water to flush and cleanse the public ways of the Commonwealth in the city of Louisville; that it did on and before the first day of January, A. D. 1880, and has continuously since and does now furnish an abundant supply of water to the public fire-cisterns, the public fire plugs and hydrants, in the city of Louisville as a protection against loss or destruction by fire of public and private property in the city of Louisville.

This plaintiff says that to the end that the property of the Commonwealth located in the city of Louisville and aggregating
6 many millions of dollars and that the property of the citizens of this Commonwealth so far as located in the city of Louisville might be protected from loss or destruction by fire, it was enacted and provided by the General Assembly of the Commonwealth of Kentucky in and by an act approved on the 3rd day of March, A. D. 1880, entitled "An act establishing a new charter for the city of Louisville," that said city should, in and by the exercise of the power of taxation delegated to it by said act, establish and maintain a fire department; and this plaintiff says that, in obedience to said legislative mandate as contained in the said act herein referred to as approved March the 3rd, 1870, and by the exercise of the power of taxation therein delegated, said city did in the year 1870 establish and has continuously since and does now maintain a fire department. This plaintiff says that to render said fire department of any benefit or to make it in any way available for the purposes of its establishment and maintenance it was on and has

constitute a completely equipped water works; to construct and maintain under and along the public ways of the Commonwealth water pipes and mains connecting all parts of the city of Louisville with its reservoirs; to construct and maintain water pipes and mains connecting the reservoirs of this plaintiff with the Ohio river; to acquire by purchase or writ of *ad quod damnum*, take, and hold, in fee simple or for a less estate, any and all lands necessary for the convenient management of the concerns of this plaintiff to
3 the end that this plaintiff might at all times be able to furnish and might furnish an abundant supply of pure, fresh, and wholesome water to the inhabitants of the city of Louisville, *that* and to the end that this plaintiff might be able to and might furnish and supply an abundance of water to flush and cleanse the public ways in the city of Louisville, and to the end that this plaintiff might be able to and might furnish a supply of water to the public fire-cisterns and public fire plugs and hydrants in the city of Louisville as a protection against the loss or destruction by fire of public and private property in the city of Louisville.

This plaintiff says that in pursuance of the provisions of its charter and in the exercise of the rights and powers thereis conferred upon it and *is* indispensable and necessary for the convenient management of its concerns, and to carry out and effectuate the purposes of its incorporation *its incorporation*, it did, long prior to the first day of January, A. D. 1880, acquire in fee simple and has since held and owned and now holds and owns the following-described real estate, to wit:

First. A lot of land, with the improvements thereon, in the city of Louisville, in the State of Kentucky, commencing on the east side of Third street, at a point two hundred and — seven feet and six inches north of and distant from the northeast corner of the intersection of Third and Walnut streets, thence north along and having a front on the east side of Third street of fifty-six feet and six inches north of and distant from the northeast corner of the intersection of Third and Walnut streets; thence north along and having
4 a front on the east side of Third street of fifty-six feet and six inches and extending back eastwardly the same width in lines parallel with the direction of Walnut street two hundred and thirty feet to an alley.

The second. A lot of land, with the improvements thereon, in the city of Louisville, in the State of Kentucky, commencing on the west side of the first alley east of and parallel with Third street and running from Green street to Walnut street, and at a point two hundred and ninety-four feet north of and distant from the north line of Walnut street; thence north along and having a front on the west side of said alley of twenty feet and extending back the same width westwardly in lines parallel with the direction of Walnut street one hundred and twenty feet.

Third. A tract of land, with the improvements thereon, in the city of Louisville, in the State of Kentucky, which tract contains two hundred and forty-five acres; is in the Edwards Pond precinct; extends from the Shelbyville turnpike to the Ohio river, and adjoins

the land of A. C. Arteburn and R. Waters. This plaintiff says that on and before the 1st day of January, A. D. 1880, it constructed and has continuously since maintained and now keeps and maintains on the lot of land last herein described and referred to as the third two reservoirs, a coal-house, stand-pipe and tower, engine-house, chimneys, pump station, fencing, and other improvements; that on and before the first day of January, A. D. 1880, it constructed and has since continuously maintained and now maintains a pipeway and pipes leading from and connecting its said reservoirs with and
5 to the Ohio river, and pipeways and pipes leading from and connecting its said reservoirs in and under the public ways with all parts of the city of Louisville.

This plaintiff says that in the acquisition of the lands hereinbefore described and in the construction and maintenance of the said reservoirs, coal-house, stand-pipe, tower, engine-house, chimneys, pump station, fencing pipe, and pipeways and other improvements, all of which are now and have continuously been prior hereto necessary and indispensable to the efficient management of its concerns and to the purposes and objects of its incorporation, it has expended and laid out over two million and five hundred thousand dollars.

This plaintiff says that it did on and before the first day of January, A. D. 1880, that it has continuously ever since, and that it does now furnish an abundant supply of pure, fresh, and wholesome water to the inhabitants of the city of Louisville; that it did on and before the first day of January, A. D. 1880, and has continuously since and does now furnish an abundant supply of water to flush and cleanse the public ways of the Commonwealth in the city of Louisville; that it did on and before the first day of January, A. D. 1880, and has continuously since and does now furnish an abundant supply of water to the public fire-cisterns, the public fire plugs and hydrants, in the city of Louisville as a protection against loss or destruction by fire of public and private property in the city of Louisville.

This plaintiff says that to the end that the property of the Commonwealth located in the city of Louisville and aggregating
6 many millions of dollars and that the property of the citizens of this Commonwealth so far as located in the city of Louisville might be protected from loss or destruction by fire, it was enacted and provided by the General Assembly of the Commonwealth of Kentucky in and by an act approved on the 3rd day of March, A. D. 1880, entitled "An act establishing a new charter for the city of Louisville," that said city should, in and by the exercise of the power of taxation delegated to it by said act, establish and maintain a fire department; and this plaintiff says that, in obedience to said legislative mandate as contained in the said act herein referred to as approved March the 3rd, 1870, and by the exercise of the power of taxation therein delegated, said city did in the year 1870 establish and has continuously since and does now maintain a fire department. This plaintiff says that to render said fire department of any benefit or to make it in any way available for the purposes of its establishment and maintenance it was on and has

been ever since the year 1870 and is now necessary and indispensable that the public fire-cisterns, the public fire plugs and the hydrants, in the said city should at all times be kept well and abundantly supplied with water; and this plaintiff says that prior to the 22d day of April, A. D. 1882, under its charter it had and was given the right to and did exact and receive from the city of Louisville payment for all water furnished and supplied by it to the said public fire-cisterns, public fire plugs and hydrants, of and in the said city of Louisville, and which water so furnished and supplied by this plaintiff to the said public fire-cisterns, public
7 fire plugs and hydrants, of the city of Louisville was on — has been continuously since the year 1870 and now is used only and solely as a protection against loss or destruction by fire of the property of the Commonwealth and its citizens so far as situated in the city of Louisville. This plaintiff says that at all times since the first day of January, A. D. 1880, it has and does now cost the plaintiff annually at least ten thousand dollars to furnish with water and keep supplied with water the said public fire-cisterns, the said public fire plugs and hydrants in the city of Louisville. This plaintiff says that there was duly passed by the General Assembly of the Commonwealth of Kentucky an act approved on the 22d day of April, A. D. 1882, and entitled "An act to amend the charter of the Louisville Water Company," and by which, among other things, it was enacted "that it shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire plugs and hydrants of the city of Louisville for fire protection free of charge, and that in consideration thereof the Louisville Water Company is hereby exempted and released from the payment of taxes of any kind and character, State, municipal, and special," and which said amendment was submitted to and approved by and became part and parcel of the charter of this plaintiff on the 22d day of April, A. D. 1882; and plaintiff says that on and ever since the 22d day of April, A. D. 1882, it has continuously and does now and free of charge therefor and without any compensation or reward therefor other than exemption and immunity of and from taxation secured and guaranteed to it by the said act herein
8 before referred to as approved on the 22d day of April, A. D. 1882, and at annual cost to itself of not less than ten thousand dollars, and to protect the property of the Commonwealth and of its citizens, so far as located in the city of Louisville, from loss or destruction by fire, furnish and supply and keep supplied with an abundance of water all each and every public fire-cistern, public fire plug and hydrant, in the city of Louisville. This plaintiff says that the said act of the General Assembly of the Commonwealth of Kentucky, approved on the 22d day of April, A. D. 1882, and entitled "An act to amend the charter of the Louisville Water Company," and the acceptance of and consent to the same by this plaintiff as a part of its charter constituted and constitutes a contract by and between the Commonwealth of Kentucky and this plaintiff, and that the exemption and immunity from and of taxation secured and given by said act in consideration of the undertaking to

and the supplying by this plaintiff, free of charge, the public fire-cisterns, the public fire plugs and the hydrants, in the city of Louisville with water as a protection against loss or destruction by fire of the property of the Commonwealth and its citizens, so far as located in the city of Louisville, is a vested right, rests in a contract as aforesaid, and is sustained, supported, and protected by the Constitution of the United States. This plaintiff says that it did not on or before nor has it at any time since the 1st day of January, A. D. 1880, nor does it now own, have, hold, or possess any other property than that hereinbefore described as belonging to it, and all and every part of which was on and before and has
9 continuously been since the 1st day of January, A. D. 1880, and now is necessary and indispensable to the efficient management of its concerns and to enable it to furnish the inhabitants of the city of Louisville with pure, fresh, and wholesome water; to enable it to furnish water to flush and cleanse the public ways in the city of Louisville, and to enable it to supply with water the public fire-cisterns, public fire plugs and hydrants, in the city of Louisville as a protection against loss or destruction by fire of the property of the Commonwealth and its citizens so far as situated in the city of Louisville.

The plaintiff says that Richard Burke was on and before and has continuously been since the 1st day of September, A. D. 1886, and now is the duly elected, qualified, and acting assessor in and for the county of Jefferson, in the State of Kentucky.

This plaintiff says that prior to the 15th day of December and in the year 1886 the said Richard Burke, assessor as aforesaid, made out and returned to the clerk of the county court of Jefferson county assessment books of all persons and property subject to taxation on the 15th day of September, 1886, in the county of Jefferson, in the State of Kentucky, under the revenue laws of the Commonwealth of Kentucky, and neither of said books when so made out or returned contained any assessment of or against this plaintiff or its property or any of its property.

This plaintiff says that on and before and ever since the 1st day of September, A. D. 1886, George H. Webb was, has since been, and now is the duly elected, qualified, and acting clerk of the
10 county court of Jefferson county; and this plaintiff says that prior to the 1st day of March, 1887, the said George H. Webb, clerk as aforesaid, made out and listed with the sheriff of Jefferson county, in the State of Kentucky, a copy of the said assessment books returned to him, the said county clerk, and made and completed as aforesaid by the said Burke as assessor, and that prior to the 1st day of February, A. D. 1887, the said George H. Webb, clerk as aforesaid, made out and delivered to or listed with the auditor of public accounts of the Commonwealth of Kentucky a copy of the assessment books returned to him, the said county clerk, and made out and completed as aforesaid by the said Burke, as assessor as aforesaid; and this plaintiff says that at no time prior to the 1st of March, 1887, was there entered in said assessment books or either of them or in any copy thereof made out by the clerk of the county court

of Jefferson county any charge against or assessment of or against this plaintiff or its property or any part of it.

This plaintiff says that at no time since the 15th day of September, A. D. 1886, was it reported by the assessor of Jefferson county or the sheriff of Jefferson county or the clerk of the county court of Jefferson county or by the board of supervisors of Jefferson county as delinquent in listing any property for taxation owned by it on the 15th day of September, A. D. 1886, and subject to taxation under the revenue laws of the State of Kentucky; and this plaintiff says it did not on or before nor has it since the 15th day of September, 1886, nor does it now own, possess, or hold any property, real or personal, which was on or before the 15 day of September,
11 1886, or has been since subject to taxation under the revenue laws of the State of Kentucky. Nevertheless this plaintiff says that subsequent to the 1st and prior to the 13th day of June, 1887, some person, without its knowledge or consent and without right or warrant of law, entered in the assessment books which were made out, completed, and returned by the said Richard Burke, as assessor, after the 15th day of September, 1886, and prior to the 15 day of December, A. D. 1886, to the said George H. Webb, as the clerk of the county court of Jefferson county, the following entry of a pretended assessment:

Louisville	Water	Company.	Coal-house	3,000
"	"	"	Stand-pipe & tower	25,000
"	"	"	Engine-house, chimney, &c.	75,000
"	"	"	Pipes under & over ground	1,500,000
"	"	"	Roads, fencing, & improvements	25,000
"	"	"	Reservoir No. 1	50,000
"	"	"	Pipeway	40,000
"	"	"	Crescent Hill reservoir	400,000
"	"	"	New pump station	7,000
"	"	"	Real estate	75,000
"	"	"	Improvements	15,000
				$2,215,000

This plaintiff says that subsequent to June the 1st, 1887, and prior to the 13th of June, A. D. 1887, there was made out by some one, and with the knowledge or consent of this plaintiff and without right or warrant of law, two tax bills against this plaintiff, one for $7,970.50 and the other for $3,400.34, numbered respectively 6505 and 6506, and presumably based on and made out in
12 persuance of said pretended assessment against this plaintiff, as hereinbefore set out, and which said pretended tax bills, without the knowledge or consent of this plaintiff and without right or warrant of law, came into the hands and possession of the sheriff of Jefferson county on or about the 4 day of June, A. D. 1887. The plaintiff says that William Clark, the defendant hereto, was on and has been since the 15th day of January, A. D. 1887, and is now the

duly elected, qualified, and acting sheriff of Jefferson county, in the Commonwealth of Kentucky; and this plaintiff says that on the 9th day of June, A. D. 1887, the defendant sent to it and there was received by it two notices which are in words and figures as follows:

"No. bill 6505.

"SHERIFF'- OFFICE, COURT-HOUSE,
"LOUISVILLE, KY., *May 9th*, 1887.

"Your State and county taxes for 1887 are now due. By an act of the last Legislature the time for collecting the same having been changed and shortened, the law compels me to distrain and add penalty if not promptly paid. The amount shown on the card is only for property in the second district.

"Bring this card with you. Amount, $7,970.50.

"WILLIAM CLARK,
"*Sheriff of Jefferson County.*"

"Bill No. 6506.

"SHERIFF'S OFFICE, COURT-HOUSE,
"LOUISVILLE, KY., *May 9th*, 1887.

"Your State and county taxes for 1887 are now due. By an act of the last Legislature the time for collecting the same having been changed and shortened, the law compels me to distrain and add penalty if not promptly paid. The amount shown on this card is only for the property in the second district.

"Bring this card with you. Amount, $3,400.34.

"WILLIAM CLARK,
13 "*Sheriff of Jefferson County.*"

And which two notices are filed herewith and made a part hereof and marked respectively A and B.

This plaintiff says that on the 13th day of September, A. D. 1887, the defendant sent to and there was received by this plaintiff the following notice, to wit:

"No. bill, 6505, 6506.

"SHERIFF'S OFFICE, COURT-HOUSE,
"LOUISVILLE, KY., *September* —, 1887.

"You are hereby notified that if your taxes for 1887 are not paid your property will be advertised Oct. 10 to be sold at the court-house door on Monday, November the 7th, 1887. Two dollars will be added to each bill Oct. 10, 1887, to pay cost of advertising. Bring this card with you.

"WILLIAM CLARK,
"*Sheriff of Jefferson County.*"

And which said notice is filed herewith and made a part hereof and marked C.

This plaintiff says that the defendant is threatening to and will, unless restrained and enjoined, seize, levy on, detach, advertise, and sell and pass away from and out of the possession of this plaintiff enough of the property of this plaintiff to realize at a sale thereof the amount of said two alleged tax bills and six per cent. thereof and costs of sale and advertising; and this plaintiff says that if the defendant does levy on, seize, detach, and take away from and out of the possession of the plaintiff any of its said property that it will render it impracticable and impossible for this plaintiff to efficiently manage its concerns; it will render it impracticable
14 and impossible for this plaintiff to furnish and supply the inhabitants of the city of Louisville with good, pure, and wholesome water; it will render it impracticable and impossible for this plaintiff to furnish and supply water to cleanse and flush the public ways in the city of Louisville, and it will render it impracticable and impossible for the plaintiff to supply with water the public fire-cisterns, the public fire plugs and hydrants, in the city of Louisville as a protection against loss or destruction by fire of the property of the Commonwealth and its citizens so far as located in the city of Louisville, and this plaintiff will thereby suffer and sustain loss and damage for which there exists no adequate remedy at law.

This plaintiff says that it has never applied to or been refused or denied by any court, judge, justice, or clerk an injunction against the defendant or in any respect to any of the matters herein set out or alleged.

This plaintiff says and avers that all of its property and all which it owned and held on the 22d day of April, A. D. 1882, and all the property it has since owned and held and all the property it now owns and holds was, by the act hereinbefore referred to as approved on the 22d day of April, 1882, exempted and released from liability to assessment for taxation thereafter by the Commonwealth of Kentucky or any of its agencies, and thereafter remained and is now so exempt and released; and the plaintiff says that the pretended assessment against it entered in said assessor's books is not only void for want of certainty, but is without warrant of law; wherefore this plaintiff prays that the defendant be enjoined and restrained
15 from suing, levying on, removing, or selling the property of this plaintiff or any of it, and that on final hearing the injunction be made perpetual; that it be adjudged that the property of this plaintiff and all the property which this plaintiff had owned, held, or possessed on the 15 day of September, 1886, was exempt and released from liability to assessment for taxation by the Commonwealth of Kentucky, and that said pretended assessment of and against this plaintiff and such tax bills and each of them based thereon and made out in pursuance thereof were and are and that each is without warrant of law.

The plaintiff prays that it have its judgment for costs and general relief.

T. L. BURNETT,
LANE & BURNETT, *Att'ys.*

Chas. R. Long says that he is president of the plaintiff, and that he believes the statements in the foregoing petition to be true.

CHAS. R. LONG.

Subscribed and sworn to before me by Chas. R. Long September 26th, 1887.

J. C. BURNETT,
Not. Pub., Jeff. Co.

The Exhibit A referred to in the foregoing petition is in the words and figures following, to wit:

EXH. A.

No. bill, 6505.

SHERIFF'S OFFICE, COURT-HOUSE,
LOUISVILLE, KY., *May* 9, 1887.

16 Your State and county taxes for 1887 are now due. By an act of the last Legislature the time for collecting same having been changed and shortened, the law compels me to distrain and add penalty if not promptly paid. The amount shown on this card is only for property in 2 district. Bring this card with you.

WM. CLARK,
Sheriff, Jefferson County.

Amount, $7,970.50.

Exhibit B referred to in petition is in the words and figures following, to wit:

EXH. B.

No. bill, 6506.

SHERIFF'S OFFICE, COURT-HOUSE,
LOUISVILLE, KY., *May* 9, 1887.

Your State and county taxes for 1887 are now due. By an act of the last Legislature the time for collecting the same having been changed and shortened, the law compels me to distrain and add penalty if not promptly paid. The amount shown on this card is only for property in 2 district.

Bring this card with you.

WM. CLARK,
Sheriff of Jefferson County.

Amount, $3,400.54.

Exhibit C referred to in the petition is in the words and figures following, to wit:

Ex. C.

No. bill, 6505 & 6506.

SHERIFF'S OFFICE, COURT-HOUSE,
LOUISVILLE, KY., *Sept.* —, 1887.

You are hereby notified that if your taxes for 1887 are not paid, your property will be advertised Oct. 10 to be sold at the
17 court-house door on Monday, November 7, 1887. Two dollars will be added to each bill Oct. 10, 1887, to pay cost of advertising. Bring this card with you.

WM. CLARK,
Sheriff of Jefferson County.

☞On the back of each exhibit (which are printed and written on postal cards) appears the direction, viz:

LOUISVILLE WATER COMPANY,
3*d*, *Green & Walnut*,
City.

Thereupon the clerk of said court issued summons & copy, directed to the marshall of the Louisville chancery court, in the following words and figures, to wit:

Summons.

Louisville Law & Equity Court.

The Commonwealth of Kentucky to the marshal of the Louisville chancery court, Greeting:

We command you to summon William Clark, sheriff of Jefferson county, to answer a petition exhibited against him in our Louisville law & equity court by Louisville Water Company, 2814, and warn him that upon failure so to do, for twenty days after service hereof if in Jefferson county or for thirty days if elsewhere in the State, judgment may be rendered by default or answer compelled or proof taken at petitioner's option, and make due return hereof within sixty days from the date hereof.

Witness John H. Weller, clerk of the Louisville chancery court and *ex officio* clerk Louisville law & equity court, at the
18 court-house in Louisville, this 1st day of October, 1887.

JNO. H. WELLER, *Clerk.*

Return.

The marshal returned said summons with the following endorsement thereon: Came to hand Oct. 3rd, 1887, at 3.45 p. m. Executed on William Clark Oct. 3d, 1887, by delivering him a copy of the within summons.

W. E. MONTZ, *M. L. C. C.*,
By W. H. NEWHALL, *D. M.*

Order Filing Answer.

And at a court held for the court aforesaid on the 3rd day of October, 1887, came defendant, Wm. Clark, sheriff of Jefferson county, and filed his answer herein.

Motion for Rule. Mo. for Receiver.

And defendant moved the court for a rule against plaintiff to show cause why it shall not be compelled to pay into court the amount of the assessment against its property, to wit, the sum of $11,371.04, or, failing in this, to show cause, if any, why its property should not be placed in the hands of a receiver until said amount, with the costs of this suit, shall be realized; to which plaintiff objects.

Mo. for Injunction.

Came plaintiff and filed notice, duly executed, on the defendant, and in pursuance thereof moved the court for an injunction against the defendant restraining him from levying on, seizing, removing, advertising for sale, or selling any of the property of this plaintiff.

Order Assigning.

To which defendant objects and this action is assigned to the 4th inst. at 4 o'clock p. m. for hearing on pending motions. Said answer is in the words and figures following, to wit:

Louisville Law & Equity Court.

LOUISVILLE WATER COMPANY
vs.
WILLIAM CLARK, Sheriff of Jefferson County.

19 The defendant, for answer to the petition, denies that the assessment against plaintiff made by the assessor of Jefferson county was made after the return of the books to the county clerk by said assessor, and denies that it was made between June 1st and June 13th, 1887. The said assessment was regularly made by the county assessor prior to the return of the books of said assessor, and the same was regularly certified to this plaintiff by the county clerk along with the other assessments, and the said assessment was made in due time and is regular. Defendant says that said assessment was made by the assessor aforesaid before the 1st of January, 1887, and before the books were returned by said assessor said assessment did appear in the books certified by the clerk of the county court to the auditor of public accounts, as well as in the book certified by the clerk of the county court to this defendant.

Defendant says that the total investment by the plaintiff, stated in the petition to be two million five hundred thousand dollars, was

very much understated. The investment by the plaintiff amounts to $4,868,707.14, and the assets of the plaintiff are now by the plaintiff estimated to be $3,805,678.03, and the annual net income of the plaintiff amounts to about $100,000, and the value of plaintiff's property is year by year largely increasing.

Wherefore defendant prays that the plaintiff be compelled to pay into this court the amount of said assessment, to wit, $11,371.04, or, failing in that, this court *a* appoint receiver to take charge of
20 the affairs of plaintiff until said money shall be collected; and this defendant prays for all general and equitable relief.

HELM & BRUCE,
Att'ys for Defendant.

William Clark says he believes the statements contained in the foregoing answer are true.

WM. CLARK.

Subscribed and sworn to before me by William Clark this 3rd day of October, 1887.

JOHN H. PAGE, *D. C.*,
For JOHN S. CAIN, *C. J. C. C.*

Said notice referred to in the order aforesaid of October 3, 1887, is in the words and figures following, to wit:

Notice & Return.

Louisville Law & Equity Court.

LOUISVILLE WATER COMPANY, Plaintiff,
vs.
WILLIAM CLARK, &c., Defendant. } 2814.

The defendant, William Clark, the sheriff of Jefferson county, will take notice that about ten o'clock in the forenoon of Monday, October the 3rd, 1887, the plaintiff will move the judge of the Louisville law & equity court, while said court is in session in the court-house, in the city of Louisville, county of Jefferson and State of Kentucky, to grant it an injunction as prayed for in the petition.

LOUISVILLE WATER COMPANY,
Per T. L. BURNETT &
LANE & BURNETT, *Att'ys.*

On the back of said notice is the following endorsement: "Came to hand Oct. 1st, 1887, at 3.45 p. m. Executed on Wm.
21 Clark October 1st, 1887, by delivering to him a copy of the within notice.

W. E. MONTZ, *M. L. C. C.*,
By W. J. SULLIVAN, *D. M.*

And at a court held for the court aforesaid on the 17th day of October, 1887.

This action, having been heard on pending motions, was submitted, and the court, not being advised, takes time.

And at a court held for the court aforesaid on the 31st day of October, 1887.

Order Filing Opinion.

The court, being now advised, delivered a written opinion herein, which is ordered to be and now is filed.

Order Overruling Motion for Rule & Receiver.

The motion of plaintiff, The Louisville Water Company, for an order enjoining and restraining the defendant, as sheriff of Jefferson county, from proceeding to collect a claim of the Commonwealth for taxes against the plaintiff by a levy upon, seizure, or sale of the property or any of it of the plaintiff, and the motion of defendant for a rule upon the plaintiff to pay into court, within a time to be designated by the court, the amount of the said claim against *by* the Commonwealth for taxes, and, in the event of the failure or the refusal of the plaintiff to pay into court the amount of said claim, then to appoint a receiver to take possession of the property and franchises of the plaintiff and operate and run the same and pay off said claim, having been heard by and submitted to the court and the court being now advised, it is considered that the motions of the defendant and each of them be overruled and denied, and to which ruling defendant excepts.

Order: Injunction.

The motion of the plaintiff is sustained and

22 the def't, William Clark, sheriff of Jefferson county, is enjoined and restrained from collecting the claim of the Commonwealth of Kentucky for taxes against the plaintiff by levy *up*, seizure, or sale of the property or any of it of the plaintiff, but this order of injunction is not to go into effect until the plaintiff shall have executed bond, with surety to be approved by the court, in the sum of ten thousand dollars, conditioned that the plaintiff will abide by and perform the judgment of the court herein; to all of which the defendant excepts.

The opinion referred to in the foregoing order is in the words and figures following (see next leaf):

23 *Opinion.*

Louisville Law & Equity Court.

LOUISVILLE WATER COMPANY
vs.
WILLIAM CLARK, Sheriff of Jefferson County. } Opinion.

This case is submitted on the pleadings—petition by the plaintiff and demurrer and answer by the defendant.

Both parties on the pleadings are seeking affirmative relief. The plaintiff prays for a judgment making its injunction perpetual, and

for its costs, and the defendant asks for the appointment of a receiver to take charge of the plaintiff's affairs until the sum of $11,371.04, which he claims that the plaintiff owes as taxes, shall be collected.

The plaintiff avers in its petition that it is a body corporate, created by the State and charged with certain public duties, among which is furnishing a supply of water to the public fire-cisterns and public fire plugs and hydrants in the city of Louisville. It avers that under and by the terms of its charter it purchased land, laid its pipes and aquaducts, and build reservoirs, coal-houses, pump station, towers, etc., for the purposes and object of its incorporation at an outlay and cost of over $2,500,000; and that on and before the 1st day of Jan. *7th*, 1880, and continuously ever since, it did and now does furnish an abundant supply of pure, fresh, and wholesome water to the inhabitants of the city of Louisville, with which to supply their wants and to flush and cleanse the public ways of the
24 Commonwealth in the city of Louisville, and to supply with water the public fire-cisterns and public fire plugs and hydrants in the city of Louisville as a protection against loss and destruction by fire of the public and private property in the city of Louisville; also for the protection of the property of the Commonwealth located in the city of Louisville, of the value of several millions of dollars.

The petition alleges that by an act of the General Assembly, approved the 3rd of March, 1870, the city of Louisville, by amendment of its charter, was required to establish and maintain a fire department for the protection of the public and private property within the territorial limits of the municipality, and that to accomplish this result it was and is indispensable and necessary that the public fire-cisterns and public fire plugs and hydrants in said city should at all times be kept well filled and, when empty, supplied with water; that prior to the 22nd day of April, 1882, the said water company under its charter had the right to exact and did exact and receive from the city of Louisville payment for all water furnished and supplied by it to the said public fire-cisterns, public fire-plugs, and public hydrants in the said city; that the said fire-plugs, public fire cisterns and hydrants, had been since 1870 solely and exclusively used for the protection against loss and destruction by fire of the property of the Commonwealth situated in the city of Louisville; that it cost the plaintiff annually $10,000 to furnish and keep supplied with water the said public cisterns, fire plugs and hydrants; that on the 22nd day of April, 1882, there was an act passed
25 by the General Assembly of the State of Kentucky entitled "An act to amend the charter of the Louisville Water Company, by which, among other things, it was provided that it should be the duty of the Louisville Water Company to furnish water to the public fire-cisterns, public fire plugs and hydrants of the city of Louisville for fire protection free of charge, and that in consideration thereof the Louisville Water Company should thereby be exempted and released from the payment of taxes of any kind whatever, State, municipal, or special," and that the said amendment was

submitted to and approved by and became a part and parcel of the charter of the said Louisville Water Company, plaintiff herein.

The plaintiff further avers that on and ever since the said 22nd day of April, 1882, it has continuously and does now, free of charge therefor and without any compensation or reward therefor other than the exemption and immunity from taxation provided in said act, secured and granted to it by said act, furnished and supplied and now keeps supplied with an abundance of water all and singular the said public fire-cisterns, public fire plugs and hydrants, in the said city of Louisville for the purpose of protection to the Commonwealth's property and the property of the citizens and municipality as hereinbefore indicated.

The demurrer and answer of the defendant admit these allegations to be true. The plaintiff contends that this is a valid, binding contract between the State of Kentucky and it, by which its property is freed from taxation; that the contract imposes mutual obligation upon it, the plaintiff, and the State which cannot be impaired by either.

26 The defendant's contention is that there is no such legal consideration, or rather constitutional consideration, under the 1st section, 13 article, of the bill of rights of Kentucky as is necessary to upold and support the immunity which the Legislature intended by the said act to confer and which the plaintiff claims was conferred upon it by the said contract.

Section 1 of the bill of rights, article 13 of the present constitution of Kentucky, provides as follows:

"That all freeman, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments of privileges from the community but in consideration of public services."

The defendant contends that the plaintiff by its contract with the State does not furnish such public services as constitute a constitutional consideration for the exclusive privilege of exemption from taxation sought to be conferred by said act of April 22nd, 1882, upon the plaintiff; and this is the first question to be decided in the case.

What must be the character of the public services rendered in order to constitute a sufficient consideration within the meaning of the constitution to uphold a contract by the State for such an exclusive privilege as is sought to be conferred by the act of April 22nd, 1882, upon this plaintiff?

Are public water works and the supply af water which they furnish to the public of such public character and value to the Commonwealth as to entitle them to the fostering recognition of the State?

Is the supply of water which the plaintiff by its contract
27 undertakes to furnish to the public fire-cisterns and public fire plugs and hydrants of the city of Louisville for the purpose of protecting the property of the Commonwealth and of the municipality from destruction by fire such "public services as are

contemplated by section 1 of the bill of rights, article 13, of the present constitution of Kentucky?

May not the action and policy adopted by the ancient and modern government-, as well as the adjudications of many States of this Union and of the Supreme Court of the United States, aid us in the solution of this question?

In the early dawn of human government the inefficiency of water as supplied by natural springs and cisterns became an important, pressing public question. The Babylonian Government by a system of public water works supplied the country and inhabitants with water from the Tigris and Euphrates; while Egypt, by like policy, utilized the waters of the Nile from the days of Sesosties and Ptolymies. The Romans, with imperial disdain of the obstacles — nature, furnished the city of this immense empire with a series of public constructions, acqueducts, reservoirs, etc., which still in their ruins excite our astonishment and admiration.

Under the emperors the Roman Government constructed 14 acqueducts, bringing water from 40 to 60 miles distance and pouring it into 247 reservoirs, "castella," within the city. Of these stupendous public works, constructed at the cost of the government over two thousand years ago for supplying ancient Rome with water, it is worthy of note that three acqueducts remain in use at the present time.

28 In Greece, at the time of the tyrant, we are informed by Thucidides (4 book, page 260) that Pisistratus, of Athens, and Polyeratus, of Somus, distinguished their rule by the construction of immense public water works to meet the exigencies of their state, bringing water to the city of Athens, over fifty miles, from the hills of Hymettus, Pentellicus, and Parnes, some of which continued to supply Athens to this day, and are marvels of mechanic enterprise and architectural skill.

We are told that Empedocles establishes in Sicily a system of extensive public water works, by means of which the city of Syracuse was supplied with water.

These public constructions by which the cities of antiquity were supplied with water were constructed by the government for the public convenience and were paid for out of the public purse. Indeed, we are informed by Livy that a tax was levied upon the citizens of the Roman Empire to defray the expenses of keeping up and maintaining and fostering these public institutions, for such they were considered. There were governmental officials, whose duty it was to supervise them, known as the *custodes acquarium.*

Outside of Italy the Roman Government constructed other water works, notably the Pont du Gard at Nismes, and also the works at Segoria, in Spain.

The magnificent water works constructed by the French Government in the reign of Louis XIV, for supplying Versailles from the river Eure, have a world-wide reputation for the magnificence of their structure. Hardly second to Maint-non *or* those public works built by the French Government for supplying the city of

29 Marseilles with water from the Durance, 60 miles distant.

The British Government considered it a primal duty to construct public water works for distributing the water of the Ganges throughout the western provinces of Bengal, at a cost of over five million- of dollars. In 1848 the English Government undertook the construction of public water works upon a most stupendous scale for supplying the city of Manchester with water, at an estimated cost of upwards of ten million- of dollars. Said works possess a capacity of supplying the city and its mills with fifty million gallons of water a day.

The public water works at Paris, Vienna, Edinburgh, and Glasgow illustrate to what a high degree this important branch of practical mechanics has been developed under the fostering care of a wise governmental policy, and reflects honor upon the munificence and wisdom of the respective governments by which they have been constructed.

The Crotan Water Works of New York certainly perform a public service to the city and State, with a supply capacity of fifty millions gallons of water per day. It supplies fifty millions gallons a day to over two million of inhabitants, residents and strangers in the city and its vicinity, and protects from fire the lives and wealth of the citizens of New York, and secures protection to the public property of the Commonwealth of New York within that city. But we are told that because our court of appeals has decided that the board of trade, composed of a few citizens in Louisville, who for common — meet in a hall of a building on 3rd and Main street to receive and communicate commercial intelligence and pass reso-
30 lutions, do not perform a public service to the city, *ergo* the Louisville Water Co., whose works are constructed on the same hydrostatic principles and for the same public purposes as those above mentioned, and which costs in their construction over two millions and one-half of dollars, does not perform public services when it supplies two hundred thousand inhabitants of the Commonwealth with water and secures protection against destruction by fire to all of the public and private buildings of the municipality; to the county court-house of Jefferson county—this massive building in which the Commonwealth for this city and county holds her courts and in which are stored away invaluable public archives and records worth millions of dollars—as well as protection to her county jail, containing over one hundred prisoners; besides swelling the public revenues of the Commonwealth by reason of the increased taxation on account of enhanced value of all the real estate and improvements in the city of Louisville within the reach of the protection of the fire department, supplied as it is with water by the plaintiff from the public cisterns, fire plugs and hydrants under the contract between it and the State by virtue of the act of April 22nd, 1882.

From the very nature of the public water works and the object and purpose of their creation the public interest- are subserved, but under this contract between it and the State by virtue of the act of April 22nd, 1882, the Louisville Water Company became bound and by an express undertaking obligated itself to render a great and

valuable public service to the public at an annual cost to it
31 of ten thousand dollars, by which, as we have seen, protection is
security to all the public and private property of the municipality free of cost and water furnished for flushing and cleansing the public highways of the Commonwealth within the city—a sanitary measure not less important in the protection which it gives to the health and lives of the citizens of the Commonwealth, not only residents, but of the whole State, in their transient visits to the city, than is the security afforded to public and private property within the city.

It is a bare-faced fal-acy containing its own exposure and refutation to contend that such a consideration is not a public service or is an inadequate consideration. Said Judge Cofer in Gardon *vs.* Winchester Building Association, 12 Bush., 114: "Permission to keep a tavern or a ferry; to erect a tall-bridge over a stream where it is crossed by the public highway; to build a mill-dam across a navigable stream, and the like, are special privileges and, being matter in which the public have an interest, may be granted by the Legislature to individuals or corporations; but the grantee upon accepting the grant at once becomes bound to render that service to secure which the grant was made, and such obligation on the part of the grantee is just as necessary to the validity of a legislative grant of an exclusive privilege as a consideration, either good or valuable, is to the validity of an ordinary contract."

Whenever, by accepting such privilege, the grantee becomes "bound by an express or implied undertaking to render service to the public, such undertaking will uphold the grant, no matter
how inadequate it may be; for the Legislature being vested
32 with the power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered in consideration thereof, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be; but when they can see that the grantee of an exclusive privilege has come under no obligation whatever to serve the public in any matter in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void, as contravening that provision of the bill of rights which prohibits the granting of exclusive privileges except in consideration of public services."

Said Burrows on Taxation, page 22: "It is the prime duty of the State to provide for the construction of sewers and water works." Doubtless the learned author has read beyond Bancroft's History of the United States. "The propriety and necessity," says Mr. Cooley in his work on Taxation, p. 98, "of the provision by taxation for a supply of water for the extinguishment of fires and for the general use of the inhabitants of large towns is not disputed."

And so Mr. Sedwick claims among the duties of Government that of constructing aqueducts, water works for the supply of the cities with water and for the public use. Sedwick on Constitutional and Statutory Construction, p. 446.

In the case of New Orleans Water Works *vs.* Rivers, 115 U. S., 674, Mr. Justice Harlan, delivering the opinion of the court, said:

33 "The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the State, which she could grant to such persons or corporations and upon such terms as she deemed best for the public interest, and as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee in respect of the subject of the grant as in the judgment of the legislative department would best promote the public health and the public comfort or the protection of public and private property. Such was the nature of the plaintiff's grant, which, not being at the time prohibited by the constitution of the State, was a contract the obligation of which cannot be impaired by subsequent legislation or by a change in her organic law.

"It is as much a contract within the meaning of the Constitution of the United States as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point."

There can be no doubt of the Commonwealth's constitutional power to construct or aid in the construction of bridges, highways, canals, railroads, acqueducts, water works, jails, and court-

34 houses, and to reimburse herself by general taxation on the property in the State, or by taxation of those persons and property more particularly and locally benefited by said improvements.

It is a question of policy with the State and not on- — power whether her reimbursement shall come from general or local taxation. This was expressly decided by the Supreme Court of the United States in Mobile *vs.* Kimball, 102 U. S., 691. Said Mr. Justice Field in delivering the opinion of the court in that case: "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of — whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized it rests with the Legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State or lay the greater share or the whole upon that county or portion of the State specially and immediately benefitted by the expenditure."

And that the services of the water company, plaintiff, are public services was expressly decided by our present court of appeals, Judge Pryor delivering the opinion, in the case of the Louisville Water Company *vs.* Hamilton, 81 Ky., 522. He said: "This corporation,

like a turnpike or a railroad, cannot be seized or sold by a collecting officer or the property necessary for its use, so as to deprive the public of the benefits to be derived from it, unless by legislative authority. The company furnishes water to nearly two hundred thousand inhabitants. Their daily wants require its exist-
35 ence and that the franchise shall be operated. It is essential to the health and comfort of the citizens and the safety of the entire city."

It is difficult, if not impossible, for a proposition to be conveyed and enforced by more expressive, unequivical, and emphatic language than that employed by our Chief Justice in the case cited, and in the case of the State *vs.* Morris Acqueduct, 46 N. J. L., 499, the court said: "If the supplying of the city or town with water is not public purposes, it is difficult to conceive of any enterprise that could be classed under that head." In Beckman *vs.* Saratoga, 3 Page, 72, the chancellor said: "Not only the agents of the Government, but also the inhabitants and corporate bodies, have been authorized to take private property for the purposes of bringing water to cities and villages."

And so Mr. Cooley on Constitutional Limitation, p. 532: "Not only the agents of the Government, but also individuals and corporations, have been authorized to take private property for the purpose of making public highways, turnpikes, roads, canals, or erecting and constructing wharves and *basis* and of establishing ferries, of draining swamps and marshes, and of bringing water to villages and cities."

And at page 533 the same learned author says: "The Government provides court-houses for the administration of justice, buildings for seminaries of instruction, and acqueducts for conveying pure and wholesome water into large cities."

36 And in Reddell *vs.* Brian, 14 Md., the court said: "Supplying the capital of the United States with water is essential for the preservation of the public buildings and the public records and the like essential to the officers of the Government is surely a public use within the meaning of our Constitution.

The same doctrine was laid down in Indianapolis Water Works *vs.* Burkhardt, 4 Ind., 369.

The conveying of water into the city of Baltimore was held to be a public service in the case of Kane *vs.* Baltimore, 15 Md., 240.

And in the City of Portland *vs.* Portland Water Works, 67 Maine, 135, it was held that the property of a water company might be exempt from taxation for the same reasons that school-houses and railroads might be exempted, to wit, for the reason that they were public works and property and rendered public services, and that it was within the constitutional competency of the State, in the exercise of its rights of eminent domain, to condemn land and private property for the purposes of a water company.

And it was held, too, and this is important to be observed, that the fact that the title of the water-works property was vested in the corporation known as the Portland Water Works Company made

no difference; for said court: "The corporation holding the title is to the same extent a trustee for the public."

To the same effect is the decision in the case of Water Company *vs.* Jersey City, 31 N. J. L., 74.

In Dingby *vs.* Boston, 100 Mass., 560, the court said:
37 "Acqueducts are often constructed by virtue of legislative acts which authorize towns or cities to take private property for that purpose."

To the same effect is the Springs Valley Water Works Co. *vs.* San Francisco, 52 Cal., 121.

In the City of Louisville *vs.* The Commonwealth, 1 Duval, 97, and in Covington *vs.* Vas Kelter, 80 Ky., 220, and in Preston *vs.* City of Louisville, 7 Ky. Law Rep., 797, the doctrine was firmly established and it may now be regarded as an axiomatic proposition, that cannot be undermined by sophistry nor battered down by acclamation, that the municipal corporation, *quoad* the governmental jurisdiction delegated to it by its charter, is a sovereig*h*ty, itself a scintilla or spark of the State government, in the exercise by the municipality *by* such delegated powers and jurisdiction. The State acts through her municipal agent, and the title of the city to property held *by* governmental purposes is the title of the State; so that all the municipal buildings of the city of Louisville—her city hall, engine-houses and station-houses, and all municipal property held for municipal governmental purposes which receive the benefit of protection against destruction by fire on account of water furnished under the contract of April 22nd, 1882, by the plaintiff—is State property, and the benefit which the city receives from said supply under the said contract enures to the Commonwealth of Kentucky, through its governmental municipal agency, the city of Louisville, and for this reason it is held that such property of the city cannot be subjected to the payment of the city's debts. This was
38 held in Meriwether *vs.* Garrett, 102 U. S., 402.

The case of The Town of West Hartford *vs.* The Board of Water Comm'rs, 44 Conn., 361, is directly in point, and is, perhaps, the best considered and most logically argued case to be found on the subject. Said Pardee, J., in this case: "The board of water commissioners were authorized by the Legislature to purchase and hold land in the town of West Hartford for the purpose of storing water and carrying it thence to the city of Hartford for the use of its inhabitants. They did purchase and now hold and use for such purpose three hundred and twenty-seven acres of land. Upon this the town of West Hartford has assessed taxes and proposes to enforce payment thereof. The commissioners deny their right to subject the land to taxation. Cities and towns are political corporations, local subdivisions of the State government, by means of which, within specified territorial limits, public order is maintained, schools and highways are established, and public health preserved. They exist only for public purposes. It is contrary to the law of their being that they should, by taxation, acquire, hold, and make profit from money as do private corporations and individuals. They have but one method for obtaining it, namely, taxation; but one use for

it, namely, the promotion of the public good. They hold it temporarily as stewards of the people until the public creditor demands it. Taxation implies tribute from the governed to some form of sovereignty; not the transfer of the property of the latter from one of its servants to another. A tax is levied by a town upon the property of its inhabitants. "It is not a charge upon the property which itself already holds for the use of the public. Money
39 in the keeping of a municipality as the result of the exercise of its power of taxation for one public use is not to be made to pay tribute to another public use. It has ceased to be taxable property in any legislative or judicial sense. The proceeds of one assessment must be protected against a second, else possibly the public money might be eaten up by the cost of successive assessments and collections on its passage from the taxpayer to the public creditor. So well established is this principal that if the statute relative to the assessment and collection of taxes has contained no reservation whatever in favor of property held by cities and towns for public purposes the courts would have assumed that the Legislature did not include such in the term 'taxable property,' but that these words were used with such limitation as repeated judicial decisions and approved commentators upon law have put upon the n Inasmuch, however, as the assessment of taxes is entrusted to the towns to be made by men skilled in the valuation of property, but presumably unlearned in legal distinctions, the Legislature, from abundant caution, has inserted an exemption of property belonging to the United States or to this State and of buildings, with their appurtenances, belonging to any town or city; and as the exemption of a court-house belonging to the United States does not find its first recognition and sole support in this statute, no more does the exemption of town property devoted to the use of the public. Doubtless when the exemption was first formed the expression 'buildings and their appurtenances' included all forms of investment
40 of corporate property for public uses which up to that time had been found necessary.

"We do not know that any city in this State had then undertaken to furnish water to its inhabitants.

"The statute is to be read as if it exempted all property held by municipalities for public use. The Legislature found in existence and recognized a well-established exemption of such property, and that privilege is not to be considered as having been abridged even if the statute failed to enumerate all forms in which such property may be used. The exemption stands upon principle, not alone upon the statute. The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public in the judicial sense of that term; not indeed as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose the Legislature invested the city with a portion of its sovereignty and authorized it to enter within the territorial limits of West Hartford and condem- by process of law certain lands therein for the purpose of storing water

for its own inhabitants. It authorized the assessment of a tax upon property within the city of Hartford for money wherewith to pay for this land, because the taking and holding was for the public good. Those lands now represent the collected tax; and as the power now resident in the several towns into which the State is divided in the aggregate represents the sovereign power of the Legislature in the imposition of taxes, it is not to be presumed that this has been entrusted to one such corporation to be used as
41 means for weakening a second by gnawing into the proceeds of one assessment by the power of another.

"The city of Hartford, in order that it might more economically discharge its duty in this behalf, entrusted this matter of the introduction of water to an agency named the board of water commissioners, and in the name of this agency these lands were purchased and are now held, but they are held merely as a trust; in substance, the land was bought and paid for by and already now is the property of the city."

The weight of authority, therefore, as well as principle and analogy, it seems to me, sustains the proposition that the public services rendered by the plaintiff to the State is a consideration for the exclusive privilege of immunity from taxation under the legislative contract of April 22nd, 1882, and is a constitutional public service and a full and adequate consideration for the public grant.

Nor do I think that a proper understanding of the case of Barbour *vs.* Louisville Board of Trade militates against this conclusion.

The contract, therefore, between the water Co. and the State, under the act of the 22nd of April, 1882, was a valid, legal, constitutional contract between parties willing and able to contract and actually contracting.

The next question to be considered is, Has that contract been rescinded and did the State have the constitutional power to rescind it?

This is a special contract of exemption between the State and the water company, not in derogation of the common right, but
42 in advancement of the public interest and economy of the State, and the rule of construction to be adopted is not to construe the statute strictly and in favor of a repeal of the contract, but liberally and in favor of upholding the good faith of the State in her contract obligation with her citizens.

The exemption here is not a gratuity to this plaintiff to the prejudice of other tax-payers, but a cheaply bought benefit to the State, which redown-s largely to the fiscal advantage of the State by reason of benefits we have shown the State derived mediately and immediately from this contract. If any doubts therefore exists by reason of the awkward phraseology of the late general revenue law as to whether it impairs the obligation of this contract between the State and the water Co., such doubts should be resolved in favor of upholding the contract and rejecting the idea of repeal rather than extorting from it an intention on the part of the Legislature inconsistent with the good faith of the State and the integrity of its contract obligations.

The general rule of construction is *specialibus non derogant generalia*, and a repeal of a special act, particularly of an act which in itself is a contract between the State and a citizen, will never be inferred from general expressions.

Glittering or sweeping generalities will not be sufficient to accomplish a repeal of a special contract act. The language must be so unambiguous and clear as to exclude the conclusion of exception.

43 The language used in section 3 of article 1 of the late revenue act is such as to render it exceedingly probable that the Legislature did intend to exclude from its repealing effect the special exemption existing by law under this contract of April 22, 1882. Either that or the draughtsman of the act makes the Legislature guilty of meaningless tautology.

There is no special reference in the late general revenue act to this special legislative contract exemption of April 22, 1882; and I cannot agree with the learned counsel for the defendant that the doubts which arise on the face of this act as to whether by its general terms it intended to repeal this special legislative contract act should be resolved in favor of the annulment of the contract rather than in favor of upholding it.

But suppose I am in error in these views, still the plaintiff is entitled to its injunction by reason of the public character of the works, which in The Water Works *vs.* Hamilton, cited above, Judge Pryor said could not be seized by the sheriff for the debts of the said company under a *fi. fa.* or otherwise.

Then the only remaining question material to be decided, conceding that the injunction must be made perpetual, is whether the defendant's motion for a receiver should be granted.

The defendant insists that the motion for a receiver should prevail on the face of the papers, under Hamilton's case in the 81st Ky., while the plaintiff insists that the procedure in Hamilton's case in this regard has been departed from by the court of appeals in two

44 later cases, to wit, in the case of The Covington Gas Light Company *vs.* City of Covington, 8 Ky. Law Rep., 443, and in Elizabethtown and Paducah R. R. Co. *vs.* Trustees of Elizabethtown, 12 Bush., 233.

The latter case was a suit for an injunction by the railroad company against the trustees of Elizabethtown to restrain the threatened sale of property belonging to the railroad for municipal taxes, on the ground that the exemption claimed by the R. R. Co. was exemption from State taxes and not from municipal taxes.

Judge Lindsey, in delivering the opinion of the court, held that the property of the railroad Co. was not liable, on account of its peculiar public character and the mischievous results that would flow therefrom to the public, to seizure and sale, upon the authority of Phillips *vs.* Winslow, 18 B. M., 448, and he made the injunction perpetual. The taxes were admitted to be due from the railroad to the municipal corporation. The necessary procedure, however, had not been taken by the municipality in that case for the appointment of a receiver, and none was appointed. Judge Lindsey said (page 239): "The collection of these taxes can be enforced only

under the supervision of a court of equitable jurisdiction, and thus the irreparable injury to the tax-payer and the inconvenience to the general public which would result from interference by ministerial officers with the operation of great lines of travel and commerce can generally be avoided."

He held, further, that "this rule of public policy which exempted the property of railroad corporations from seizure and sale by ministerial officers for the collection of taxes was paramount to the interest of judgment creditors, and that they had to yield to
45 it even as the Commonwealth yields to it in the collection of public dues."

In accordance with these views the judgment of the circuit court of Hardin county dismissing the petition of the railroad for an injunction was reversed and the cause was remanded, with instructions to enjoin perpetually the sale of the railroad company's cars for taxation.

Now, it is manifest that if Hamilton's case, appointing a receiver to take charge of the water company's property without any procedure by the tax collector or petition containing sufficient allegations therefor, had been approved the judgment of the court would have been enjoining the sheriff and in addition thereto appointing a receiver upon the averments of the bill to take charge of the railroad's property. This certainly is an implied disapproval of and a positive departure from the Hamilton case by the court of appeals.

In The Covington Gas Light Co. *vs.* City of Covington Judge Pryor, delivering the opinion of the court, followed the Elizabethtown & Paducah R. R. case, disapproving of and departing from the Hamilton case. That was a suit by the Covington Gas Light Co. against the city of Covington to enjoin and restrain the collection of certain tax bills against that company on the ground that the property assessed was exempt from the payment of taxes, and that, whether it was exempt or not, the officer had no power to distrain the goods of the said company for the unpaid taxes. In delivering the opinion of the court the learned judge said: "The wants of the public require and demand that this franchise, although granted to a private corporation, shall be devoted to the public use.
46 The chancellor in a proper proceeding can require the company, through its chief officer, to pay the taxes into court or place the property in the hands of a receiver for that purpose." Citing the Hamilton case.

Now, it will be observed that there were no proceedings for the appointment of a receiver in the Hamilton case; yet the law was laid down in the Hamilton case that while the property of a public corporation, whose functions were essential and valuable to the public, could not be seized by an officer and subjected to the payment of taxes, yet a receiver might be appointed upon the bare allegations of the petition for an injunction to take charge of the property until the amount of the taxes should be paid in or collected. So that it is manifest that while the Hamilton case is an undoubted authority in support of the proposition that the appointment of a receiver is the proper method for the enforcement of the collection

of taxes from such corporations, yet it is no authority for the other branch of the proposition contended for by the defendant that a receiver may be appointed by the court *ex mero motre* in the absence of a proper proceeding taken by the public officers or the Commonwealth for that result. In the Covington Gas Light case the chancellor of the Kenton chancery court perpetuated the injunction restraining the remedy by distress for the collection of the taxes. No receiver was appointed by him, and this branch of his judgment was affirmed by Judge Prior. He said at page 448 (8 Ky. Law Rep.):

"It follows, therefore, that the pipes, post, and meters are
47 liable to taxation whether considered real or personal estate;
but it also follows that the remedy for a distress is improper when the seizure of the property of the corporation will destroy its public use, and for that reason the judgment below is reversed with directions to restrain the city from selling the property levied on, so forming the judgment as to show that the remedy adjudged is alone withheld, leaving the city to proceed, if it sees proper, in some other mode of enforcing payment. In all other respects we concur with the views expressed in the judgment appealed from."

Without in express terms overruling that branch of the decision in the Hamilton case by which a receiver was appointed in the absence of any proceedings instituted by the sheriff for the enforcement of the collection of taxes, these two decisions irreconcilably depart therefrom, and, as I think, re-established the well-recognized doctrine which underlies and surrounds this branch of equity jurisprudence that the appointment of a receiver will never be granted in the absence of a proper proceeding instituted therefor, and clearly established upon grounds fully averred in the pleading and sustained by proof or affidavit. Indeed, in any case there must be extreme circumstances clearly averred and fully established that would justify a court of equity in administering such a severe remedy. Here the exercise of the highest powers of the court are invoked, by which the pl'ff's property will be taken from its possession *in liminie* at the very threshold of this litigation in the absence of any aver-
ment or proof by the defendant showing that he is entitled
48 to such an extraordinary remedy, and in the very face of the
averments of the pl'ff's petition denying that it is under any legal obligations to pay one cent. To my mind it would be prejudging the plaintiff's case and reversing the ordinary course of administering justice in court of equity to grant the defendant'- motion for a receiver in the absence of any allegations or proof in this case showing that the plaintiff owes the Commonwealth one dollar. The merits of the controversy have not been adjudicated. The legal rights of the parties have not been passed upon, and the defendant has taken no proceedings to show that the plaintiff owes it one cent and that it is entitled to a receiver.

And yet he moves the court upon the controverted allegations of the petition to appoint a receiver in advance of a decision upon the merits and without averring that the interest- represented by him are in anywise endangered or will be jeopardized by deferring this

extraordinary remedy until the rights of the parties involved in this litigation can be heard by the court.

I will never believe that such a proceeding can be countenanced or approved until there is a clear adjudication upon the question by the court of appeals.

As I shall decline to appoint a receiver on the motion of the defendant on the present state of the pleadings, it becomes unnecessary to pass upon the validity of the assessment or the steps taken by the assessing officer in making the said assessment.

Let judgment be entered making the injunction perpetual and for the plaintiff's costs.

The motion by plaintiff for a receiver is overruled.

49 And at a court held for the court aforesaid on the 1st day of November, 1887, came the plaintiff, The Louisville Water Company, and produced in court herein a bond to defendant, William Clark, as the sheriff of Jefferson county; which bond was approved by the court and ordered to be, and now is, filed and recorded, Chas. R. Long being surety on said bond.

Said bond is in the words and figures following, to wit:

Bond.

Louisville Law & Equity Court.

LOUISVILLE WATER COMPANY, Plaintiff,
vs.
WILLIAM CLARK, Sheriff, &c., Defendant. } 2814.

We, The Louisville Water Company, as principal, and Chas. R. Long, as surety, acknowledge ourselves bound unto the defendant, William Clark, as the sheriff of Jefferson county, in the sum of ten thousand dollars, conditioned that the plaintiff, The Louisville Water Company, will abide by and perform the judgment of the court. This Nov. 1st, 1887.

LOUISVILLE WATER COMPANY,
By CHAS. R. LONG, *President.*
CHAS. R. LONG.

Att.: LOUIS SUMMERS,
Dep. Cl'k Lou. Ch'y Court.

Approved November 1st, 1887.
STERLING B. TONEY, *Judge.*

50 *Order — Postpone.*

And at a court held for the court aforesaid on the 21st day of November, 1887, this action, having been set at rules by plaintiff on the 14th inst., is now postponed until the 28 inst. for hearing.

Order Filing Am'd Answer.

And at a court held for the court aforesaid on the 28th day of November, 1887, came defendant, William Clark, by counsel, and filed an amended answer herein, and this action is now postponed until the 30th inst. for hearing.

Said amended answer is in the words and figures following, to wit:

Amended Answer.

Louisville Law & Equity Court.

LOUISVILLE WATER CO., Pl'ff,
vs.
WM. CLARK, Sheriff, &c., Def't. } 2814.

The defendant amends his answer herein by making the same a counter-claim against the plaintiff.

Wherefore def't prays as heretofore.

HELM & BRUCE,
Att'ys for Def't.

Order Filing Demurrer.

And at a court held for the court aforesaid on the 30th day of November, 1877, came plaintiff, by counsel, and filed a demurrer to the answer and counter-claim of defendant.

And said demurrer was submitted, and, the court being advised, it is considered and ordered that said demurrer be, and now is, sustained; to which defendant excepts.

Order — Postpone.

And this action is postponed until December 7th, 1887,
51 with leave until that date to defendant to plead.

Mo. to Remand Overruled.

Came defendant, by counsel, and moved the court to remand this action. Came plaintiff, by counsel, and objects to said motion; and said motion was submitted, and the court being advised, it is considered and ordered that said motion be, and is now, overruled; to which defendant excepts.

Said demurrer is in the words and figures following, to wit:

Louisville Law & Equity Court.

LOUISVILLE WATER COMPANY, Plaintiff,
vs.
WILLIAM CLARK, &c., Defendant. } 2814.

Demurrer.

Came this day the plaintiff and demurred to the answer of the defendant because it does not state facts or any fact which is sufficient to constitute a defense.

T. L. BURNETT,
LANE & BURNETT, *Att'ys.*

Order Filing Amended Answer.

And at a court held for the court aforesaid on the 5th day of December, 1887, came defendant Clark, by Helm, counsel, and filed an amended answer herein.

Order Filing Demurrer & Sust'g.

Came plaintiff, by counsel, and filed a demurrer herein to the answer as amended.

And said demurrer is now sustained; to which defendant excepts.

Said amended answer is in the words and figures as follows:

Louisville Law & Equity Court.

LOUISVILLE WATER COMPANY
vs.
52 WM. CLARK, Sheriff, &c. } 2814.

Amended Answer.

The defendant amends his answer herein and denies that the exemption from taxation was in consideration of the duty imposed upon the Louisville Water Co. of furnishing water to the public fire-cisterns or public fire plugs or hydrants of the city of Louisville for fire protection free of charge, but for the sole consideration named in the act. This def't prays as heretofore.

HELM & BRUCE, *For Def't.*

Said demurrer is in the words and figures as follows:

Louisville Law & Equity Court.

LOUISVILLE WATER COMPANY
vs.
WILLIAM CLARK, &c. } 2814.

Demurrer.

The plaintiff demurs to the answer of the defendant as amended because it states no facts sufficient to constitute a defense.

LANE & BURNETT, *Att'ys.*

Order Submit.

At a court held for the court aforesaid on the 7th day of December, 1887, this action, coming on to be heard, was submitted, and the court, not being advised, takes time.

Judgment.

And at a court held for the court aforesaid on the 7th day of December, 1887.

This action coming *this* day *on* to be heard and the defendant failing to further plead or amend, and the action having been
53 heard and submitted and the court being advised, it is considered that the counter-claim of the defendant be dismissed, and that the injunction heretofore granted be, and the same is, made perpetual, and that plaintiff recover of the defendant its costs herein expended and for which it may have execution as in an action at law, and to all of which the defendant excepts and prays an appeal to the court of appeals, which is granted.

Clerk's Certificate.

COMMONWEALTH OF KENTUCKY:

Louisville Law & Equity Court.

I, Jno. H. Weller, clerk of said court, do hereby certify that the foregoing 52 pages, including this, contain a full, true, and complete transcript of the record in the case wherein Louisville Water Co. is plaintiff and Wm. Clark, sheriff, is defendant in the caption mentioned, as appears *of* on file and of record in my said office.

Witness my hand as clerk this 12th day of December, 1887.

JNO. H. WELLER,
Cl'k Louisville Ch'y C'rt & ex Officio Cl'k L. L. & E. C't.

Upon the filing of the foregoing transcript the appellant, by consent, filed the following statement, to wit:

Appellant's Statement.

Kentucky Court of Appeals.

WM. CLARK, Sheriff, Appellant,
vs.
LOUISVILLE WATER CO., Appellee.

Judgment appealed from is on page 52 of the Record, and was rendered on the 7th day of December, 1887. Appeal was granted by the court below.

54 No process desired.

HELM & BRUCE,
Att'ys for Appellant.

And afterwards, at a term of said court of appeals held in and for the Commonwealth of Ky., at the capitol in Frankfort, on March 17, 1888.

Order Cont'g for Oral Argument.

CLARK, Sheriff, &c.,
vs.
LOUISVILLE WATER CO.

Ordered that this case be continued for oral argument.

And afterwards, at the September term, November 3, 1888.

Cause Submitted.

This cause came on and was argued by H. M. Lane & T. L. Burnett for appellee and J. P. Helm for appellant and submitted.

Afterwards, on November 12, 1889.

Judgment Approved.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be approved by a divided court, which is ordered to be certified to said court.

Costs for Appellee.

It is further considered that appellee recover of appellant its costs herein.

Afterwards, on December 7, 1889.

Order: Mandate Set Aside & Case Cont'd.

Ordered that the mandate herein be set aside, and that this case be continued for oral argument.

Afterwards, on January 9th, 1890.

Cause Argued & Laid Over.

This cause was argued by Wm. Lindsay for appellee, Helm & Bruce for appellant, and laid over for further argument.

55 Afterwards, on January 11, 1890.

Cause Argued & Submitted.

This cause was argued by T. L. Burnett for appellee, J. P. Helm for appellant, and submitted.

Afterwards, on October 9, 1890.

Judgment Reversed.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and the cause remanded, with directions to render a judgment as indicated in the opinion herein; which is ordered to be certified to said court (Judge Prior dissenting).

Costs for Appellant.

It is further considered that appellant recover of appellee his costs expended.

Afterwards, on October 10, 1890.

Judge Pryor's Opinion Filed.

WM. CLARK, Sheriff, &c.,
v.
LOUISVILLE WATER CO.

Judge Pryor filed his dissenting opinion herein.

56 Following is the opinion of the court, delivered October 9th by Chief Justice Holt:

Opinion by Chief Justice Holt.

The real estate and improvements thereon of the appellee, The Louisville Water Company, were assessed for State and county taxes for the year 1887 at the value of two million two hundred and fifteen thousand dollars. The taxes amount to eleven thousand three hundred and seventy-one dollars and some cents; and the tax bills therefor being in the hands of the sheriff, and he about to seize and sell thereunder certain property of the appellee in use in its business, it by this suit enjoined him from so doing, the principal ground upon which it claims relief being that its property is by law exempt from assessment and taxation. This claim is based upon an act of the Legislature of April 22, 1882, and which reads as follows:

"1. That it shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of charge.

"2. The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character—State, municipal, and special."

57 Upon the hearing in the lower court the appellee moved to make the temporary injunction which had been granted per-

petual; while the appellant, inasmuch as the property of the company in use cannot be seized and sold, thus depriving the local public of the benefits derived from it, moved that it be compelled by rule to pay the taxes into court, or, failing to do so, that its property be placed in a receiver's hands until enough should be realized to pay them. This relief was also asked in the answer, to which a demurrer was sustained.

The motion of the appellant was overruled and the injunction perpetuated, the court not only holding that the property of the company could not be seized and sold, but that it was not liable for the taxes.

The constitutionality of the act *supra* is involved. It is claimed for the company that it has a vested right to the exemption, resting in contract; that by the passage of the act of the Legislature and its acceptance by the company a contract was entered into which entitles it to the exemption, and such a privilege is in derogation of the common right. As the exemption of one person from taxation places an additional burden upon the other taxpayers of the State, it will not be presumed, but must appear by clear grant.

It is true, as has often been said, that exemption is the exception and not the rule.

Upon the other hand, however, where the Legislature clearly grants this privilege or attempts to do so, its action must be presumed constitutional.

58 As the language of the act in this case is plain, it becomes the delicate duty of this court, keeping in mind the presumption in favor of legislative action, to determine whether in its enactment the Legislature has gone beyond the constitutional limit.

The first section of our bill of rights provides that "no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services."

The appellant contends, first, that if it were true the Legislature was moved to the passage of the act upon the idea of the rendition of a public service, yet that in fact the company renders no such public service as the constitution contemplates; and, second, that this was not the reason for its enactment, and that it is altogether unsupported by any valid consideration or such as the constitution recognizes.

We shall pass by the question whether the rendition of a local public service, as to furnish the city of Louisville with water, is a valid consideration for an exemption from State taxation, thereby imposing an additional burden upon all the balance of the people of the State, or whether it is a governmental duty of the State to furnish to a city water for fire protection and sanitary purposes free of charge either by direct taxation upon all the people of the State or indirectly by an exemption from taxation in favor of the one doing so, and, if so, being therefore a valid consideration for such an exemption.

This is a question as to which there is a difference of opinion; and in view of the conclusion we have reached as to the sec-

59 ond position taken by the appellant it is unnecessary to consider it.

We think it evident that the furnishing of water by the company to the city for fire protection free of charge was not what induced the passage of the act. Its recitals, aside from the express statement in it of the reason, make this quite plain.

It says: "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal, and special."

According to the legislative recital the sinking fund of the city owns the entire stock of the water company.

There is nothing in the record showing otherwise, and it must therefore be assumed to be true. While the sinking fund department is a separate corporation from that of the city proper, yet it is merely the money-making branch of the municipal government. It has charge of its funds and its investments, whether in bank, railroad, water-company stocks, or other valuable and money-making securities.

We see, therefore, that the property and rights of the water company belong to the city. While, therefore, the act recites that it shall be the duty of the water company to furnish water to the public fire-cisterns and public fire plugs or hydrants of the city for fire protection, yet this could not have been the consideration that induced the passage of the act, since it made no difference to the city
60 whether a million of dollars or a penny might be paid for this service, because it was the owner of the rights and property of the water company, and it would therefore be but a payment to itself. It cannot be supposed, therefore, that the Legislature intended to relinquish over ten thousand dollars of taxes annually in consideration that the city would not charge itself for water furnished by itself.

It is useless to inquire why the act declared that the water company should furnish water to the city free of charge. Perhaps, as suggested by counsel, it was merely to avoid the trouble of keeping an account between the sinking-fund department and the city proper.

The reason which induced the attempted granting of the exemption must therefore have been, as indeed the act recites, that the sinking fund of the city—or, in other words, the city itself—owned all of the water-company stock. It says: "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character, State, municipal, and special."

We have, therefore, an express recital by the Legislature of its reason for the attempted exemption, and that this was the true and

only one is confirmed beyond question by the other recitals of the act.

The question, therefore, is, Did the fact that the sinking fund or, in other words, the city owned the water-company stock
61 constitute a valid consideration for the exemption?

A municipal corporation has a double character. In one it acts strictly in its governmental capacity; in the other, for the profit or convenience of its citizens.

Considered in the latter light it occupies the attitude of a private corporation merely, while in the former it is an arm of the State government or a part of its political power. It is an *imperium in imperio.* The property necessary to the exercise of those duties which are strictly governmental is exempt from taxation, but this is not so of that which is held by the municipality for the comfort of its citizens, individually or collectively, or for money-making purposes merely.

While the sinking fund of the city of Louisville is a distinct corporation, yet it is owned by the city and merely controls its funds. It discharges no governmental duties and was created merely to make money for the city. It may invest the funds in stocks of any character, if they are likely to bring good returns, like any other private corporation. It will hardly be contended that if it were to invest surplus money in a private manufacturing company that the Legislature could constitutionally exempt that company from taxation.

In short, the city, in its private and not its governmental character, owns the stock and property of the water company, and this ownership is not necessary to the execution of its duties as a political or governmental power.

This being so, it stands upon the same footing as would any individual or body of persons if like privileges had been con-
62 ferred upon them, and cannot be constitutionally exempted from State taxes save in consideration of public services.

The fact that the furnishing of the water may incidentally protect from fire the public buildings of the State will not support the exemption.

The privilege was not conferred, as the Legislature declared and as we have otherwise shown, for governmental purposes, but merely for a reason which will not support it.

It arose out of considerations relating to the private and pecuniary advantage of the city and in which the State at large had no interest.

It was said in Bailey *v.* City of New York, 3 Hill, 539: "But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation (the city) *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

If it be said that the exemption should be upheld if it be in fact supported by any valid consideration, although the recited one be

invalid, we reply that the real consideration and the one which moved the parties to the transaction is to be regarded.

The one acted upon by the Legislature and expressed in the act, and which must have been understood by the city, was the simple fact that it owned the stock in the water company. This was not a valid consideration, and we have already seen that mere incidental protection of the public buildings does not aid the matter.

63 The so-called contract was therefore void at its inception.

Instead of being impaired in any way forbidden by law, it never had any existence; and it seems to us well that we feel at liberty to so declare, because we have a general law taxing water companies, and if one company be exempt, that of any other city has an equal right to ask the privilege. A statute exempting one is certainly open to the objection of impolicy, if, indeed, it be not such unequal and partial legislation as is forbidden by law.

The appellee by this suit came into court asking equitable relief by injunction or the exercise of an extraordinary remedy. Asking equity, it may well be required first to do equity, and, being in court and liable for the tax and the chancellor being in possession of the case, while its property in use in its business could not be seized, it should have been required to pay the taxes into court; or, failing to do so within a reasonable time, the management of it should have been intrusted to a receiver until enough was realized to pay them and the costs of the proceeding.

Louisville Water Company *v.* Hamilton, 81 Ky., 517.

The judgment is reversed and cause remanded with directions to render a judgment as above indicated.

The following is the dissenting opinion delivered October 10 by Judge Pryor:

Dissenting Opinion by Judge Pryor.

In determining the constitutionality of the act in question it is only necessary to consider sections one and two.

64 Sec. 1 provides that it shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of charge.

"SEC. 2. The sinking fund of Louisville being the owner of the stock of the Louisville Water Company, and the said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted from the payment of all taxes of all kinds of whatever character—State, municipal, and special." It is the settled doctrine of this State that no exemption of one's property from taxation is valid where like property of another is taxed unless the exemption proceeds from the consideration of public service. Such legislation in the absence of this consideration is in direct violation of the bill of rights that prohibits the granting of such a special immunity, nor can it be

maintained that the public service constituting the consideration for the exemption must be for the discharge of a duty for which an appropriation from the State treasury might be made or that the public service should directly benefit the whole people of the State. If this be the correct rule, seminaries of learning and all charitable institutions could receive no support in the way of legislative exemption. It is not necessary, however, to review the cases on this subject, as the opinion of the majority of the court is based upon the idea that no consideration exists in this case for the exemption, and I shall therefore consider this question alone, being satisfied, after a careful examination of the record, that
65 the exemption of the water company is not only valid, but was an act of justice and right on the part of the law-making powers to the tax-payer of the city of Louisville.

It is admitted, or if not the fact exists, that the water company received payment for furnishing the water to these public fire-cisterns and fire-plugs up to the year 1882, and then the act was passed making the exemption.

The city of Louisville purchased all or nearly all of the stock of the water company and was at the time the exemption was made the sole owner of the property, with the exception of one or two shares of the stock; it is, therefore, argued that because the city owned the entire stock it was immaterial whether it received a penny or thousands of dollars for furnishing this water, it was but a charge in the first place to the city, and then a payment back to it of the money expended, and for that reason the supply of water for public purposes could not have constituted the consideration for relieving the company from taxation, and the only motive inducing the Legislature to grant the privilege consisted in the fact that the city owned the water company, as recited in the second section of the act.

It is further argued, and so adjudged in the principal opinion, that the city can only be regarded as a stockholder in a private corporation and not as the owner of this stock in its governmental capacity. The city of Louisville contains near two hundred thousand inhabitants and has within its corporate limits public
66 buildings belonging to the Federal Government and its own court buildings and other property necessary to the conduct of State affairs. It acquired the stock of the water company from revenues collected from the tax-payers within its limits and made expenditures of large sums of money for that purpose that, when invested for both public and private use, is now sought to be made liable for taxes by the collecting officer with the legislative exemption remaining in full force. It is not the water company or the sinking fund that is called on to pay these back taxes, amounting now to near seventy thousand dollars, but the tax-payer of the city, represented in name only by the two corporations.

The tax-payer has been already taxed to enable the city to make the purchase of the water company or to pay for the stock in the corporation, and after being taxed for that purpose, is again taxed for the water he drinks and uses on his premises, receiving no other

compensation whatever except this convenience, that becomes a necessity in every densely populated city. A plain distinction exists, therefore, between a private company furnishing water to the city and its population at certain specific rates and the city taxing the property-owner in order that he may obtain water for his own use and then applying the right to the use in part to the protection of the public property located within the city, or, if taxed for more than will supply the city, the additional tax finds its way to the sinking fund for the payment of the debts of the municipality. Nor is the protection afforded the public or the public buildings of the
67 city merely incidental, as the act of April 22, 1882, makes it the duty of the corporation to furnish the water to the public fire-cisterns and public fire-plugs or hydrants free of charge. If this water company, therefore, owned by the city, should refuse or fail to furnish this water and a public building is destroyed by fire by reason of this neglect, it is evident that the company would be responsible for the loss.

A public duty required to be performed for which an action would lie for a failure to discharge it, and still it is insisted that the reason prompting the Legislature to make the exemption was because the city of Louisville in fact owned the stock of the corporation. I have no doubt but such was the inducement, and why, because the city tax-payer had assumed heavy burdens to obtain the stock, and a portion of those burdens being used by the city for the protection of both public and private property, it was thought both equitable and proper that the exemption should be made. The city has assumed a duty that not only affords incidental protection, but by the express terms of the charter it is made obligatory on the city to discharge that duty, and in the very next section following the exaction of the duty is the recital that as the city owns the stock, the water company is exempt from taxation. Where there is an exemption we look to the act to see if there is a public service to perform, and if none the exemption must be held invalid. If there is such a consideration the statute must stand, however impolitic the legislation may be.

68 After the exaction of this duty and its full performance by the city the collector of taxes in behalf of the State levied on the property of the water company for the State taxes; levied his tax writ upon property that the citizens had been taxed to purchase in order to supply an absolute want; that he is again taxed for as the water enters his dwelling and required to maintain by taxation under the power of the municipal government the existence of the water works for the purpose of performing a public duty imposed by the act under consideration. It seems to me neither just or equitable to consider the municipality as the owner of a private corporation when attempting to impose such taxation on the tax-payer, who is the real party to this action and who receives nothing but the water he uses and drinks in the way of private gain. The Legislature, viewing the question in this light, granted the exemption, and to make it binding on the State, at least so long as it

stands unrepealed, required the performance of a public duty that the city has never failed to discharge.

The Supreme Court, in 115 U. States, 691, in the case of the Louisville Gas Co., held that the distribution of gas in densley populated districts was a matter of which the public could assume control, and in supplying it for public and private use was such a public service as authorized the grant of the exclusive privilege. The same doctrine was recognized by that court in the case of the New Orleans Water Works Co., reported in the same volume. Why the State may not impose upon a municipality the performance of a service for the public good I am unable to perceive. It is but a sub-
69 ordinate agency of the State government. Here the entire expense of furnishing water is placed upon the tax-payer- of the city, and this is proper, because they are the real beneficiaries; but the Legislature, knowing the oppressive burdens that pertain to the administration of municipal government in the imposition of taxes, has attempted to aid the tax-payer by releasing the State taxes upon a consideration resulting in the public good, and for a failure to comply with or continue the consideration prompting the exemption if loss should occur a legal liability would at once arise, and to discharge which a resort to the tax-payer must be again had. There can be no constitutional inhibition to such legislation, and to assign another motive on the part of the Legislature for the exemption than the consideration expressly stated in the act is no argument against its validity or a sufficient reason for declaring the act of exemption unconstitutional and void. I am, therefore, unwilling to impose upon the tax-payer the sum of seventy-five thousand dollars in the way of back taxes in the face of a legislative exemption standing unrepealed, based upon a sufficient consideration and made with a view of affording that legislative aid to the tax-payer upon his performing a public service.

70 On the 15th day of November, 1890, the plaintiff in error filed in the office of the clerk of the court of appeals the following assignment of errors:

THE LOUISVILLE WATER COMPANY, Plaintiff in Error,
vs.
WILLIAM CLARK, Sheriff of Jefferson County, Defendant in Error.

The plaintiff in error, The Louisville Water Company, comes and assigns errors as follows:

First. The court of appeals erred in reversing the judgment of the Louisville law and equity court and in authorizing and directing the enforcement of taxation in favor of the Commonwealth of Kentucky then and there in process of collection by the defendant in error, William Clark, sheriff of Jefferson county.

Second. The said court of appeals erred in adjudging that the property of the plaintiff in error can be subjected to the payment of taxation to the Commonwealth of Kentucky and in adjudging that said property can be so subjected without violating the Constitution of the United States.

Third. The said court of appeals erred in failing and refusing to affirm the judgment of the Louisville law and equity court and in failing to adjudge that the property of the defendant in error was and is exempt from taxation to the Commonwealth of Kentucky.

THE LOUISVILLE WATER COMPANY,
By T. L. BURNETT,
LANE & BURNETT AND
WILLIAM LINDSAY.

71 On the 5th day of February, 1891, the plaintiff in error filed in the clerk's office of the Kentucky court of appeals its assignments of error in words and figures following, to wit:

Supreme Court of the United States.

THE LOUISVILLE WATER COMPANY, Plaintiff in Error,
vs.
WILLIAM CLARK, Sheriff of Jefferson County, Defendant in Error.
} Assignment of Errors.

The Louisville Water Company, plaintiff in error, comes and complains of the judgment rendered herein by the court of appeals of the Commonwealth of Kentucky. The said court had jurisdiction of the subject-matter of the litigation, and is the highest court in said Commonwealth having such jurisdiction, and its said judgment is final.

The said court erred—

First. In adjudging that the act of the General Assembly of Kentucky, approved April 22nd, 1882, entitled "An act to amend the charter of the Louisville Water Company," after being accepted and its conditions performed by the plaintiff in error, does not constitute a legal, valid, and enforceable contract between the Common-
72 wealth of Kentucky and the said plaintiff.

Second. The said court erred in adjudging that the said contract is not supported by a legal and valuable consideration upon the part of the said plaintiff in error.

Third. The said court erred in adjudging that the authority exercised under, in the name, and for the benefit of the Commonwealth of Kentucky, in the assessment of the property of the plaintiff in error for taxation and in attempting to enforce the collection of such taxes, does not impair the obligations of the contract involved in the acceptance by the plaintiff in error of the provisions of the said act approved April 22, 1882.

Fourth. The said court of appeals erred in reversing the judgment of the Louisville law and equity court, and in remanding the cause to that court with instructions to require the plaintiff in error to pay the alleged taxes into court, or, failing to do so within a reasonable time, the management of the business of the plaintiff in error to be intrusted to a receiver until enough money is
73 realized to pay the said taxes and the costs of the litigation.

Fifth. The said court erred in not affirming the judgment of the said Louisville law & equity court.

THE LOUISVILLE WATER COMPANY,
By T. L. BURNETT, LANE & BURNETT, &
WILLIAM LINDSAY, *Att'ys.*

On the said February 5, 1891, the said plaintiff in error filed in said clerk's office a supersedeas bond in words and figures following, to wit:

Circuit Court of the United States, District of Kentucky.

WILLIAM CLARK, Sheriff of Jefferson County, State of Kentucky,
vs.
THE LOUISVILLE WATER COMPANY.

Know all men by these presents that we, The Louisville Water Company, principal, and Charles R. Long, surety, — held and firmly bound unto William Clark, sheriff of Jefferson county, Kentucky, in the sum of twenty-five thousand dollars, to be paid to the
74 said William Clark, sheriff of Jefferson county, Kentucky, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-eight- day of January, A. D. 1891.

Whereas the above-named Louisville Water Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the court of appeals of Kentucky:

Now, therefore, the condition of this obligation is such that if the above-named Louisville Water Company shall prosecute its writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[Seal Louisville Water Company.]

LOUISVILLE WATER COMPANY, [L. S.]
By CHAS. R. LONG, *President.* [L. S.]
CHAS. R. LONG, *Surety.* [L. S.]

Attest: W. P. McDOWELL, *Treas.*

Sealed and delivered in presence of—
SAM'L B. CRAIL.
HENRY F. CASSIN.

Approved this 28 Jan'y, 1891.
Witness my hand and seal.
[Seal 6th Circuit Court, Ky., U. S. of America.]

SAM'L B. CRAIL,
Clerk U. S. Cir. Court, Ky. Dist.

Approved:
H. B. BROWN,
Associate Justice Supreme Court U. S.

75 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William Clark, sheriff of Jefferson county, Kentucky, appellant, and The Louisville Water Company, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
76 of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellee, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
HENRY B. BROWN,
Associate Justice Supreme Court U. S.

77 COMMONWEALTH OF KENTUCKY, *Court of Appeals,* } *sct:*

I, Woodford W. Longmoor, clerk of the court of appeals for the Commonwealth of Kentucky, certify that the preceding seventy-four pages contain a true and complete transcript of the record and proceedings had in the case of William Clark, sheriff of Jefferson county, appellant, against The Louisville Water Company, appellee, together with the assignment of errors and supersedeas bond filed therein, as appears of record and on file in my office. The writ of error is returned herewith.

In testimony whereof I have hereunto set my hand and affixed the seal of my said office.

Seal Kentucky Court of Appeals.

Done at Frankfort, Kentucky, this 5th day of February, A. D. 1891.

WOODFORD W. LONGMOOR,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $27.00.

78 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Clark, sheriff of Jefferson county, Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Louisville Water Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 30th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

HENRY B. BROWN,
Associate Justice Supreme Court U. S.

79 On this ninth day of February, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared Charles Hermany before me, the subscriber, and makes oath that he delivered a true copy of the within citation to William Clark, sheriff of Jefferson county, Kentucky, on Saturday, February 7th, 1891.

CHAS. HERMANY.

Sworn to and subscribed the above affidavit and return before me February 9th, A. D. 1891.

[Seal Wallace W. Morris, Notary Public, Jefferson Co., Ky.]

WALLACE W. MORRIS,
N. P., J. C., Ky.

80 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Ayres, committee of the estate of William Clark, sheriff of Jefferson county, Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 28th day of May next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Kentucky, wherein The Louisville Water Company is plaintiff in error and William Clark, sheriff of Jefferson county, Kentucky, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

MELVILLE W. FULLER,
Chief Justice of the United States.

81 On this seventh day of May, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared William Krieger before me, the subscriber, J. C. Burnett, a notary public in and for the county of Jefferson, in the State of Kentucky, and makes oath that he delivered a true copy of the within citation to William Ayres, committee of the estate of William Clark, sheriff of Jefferson county, Kentucky, on May 7th, 1891, at 9 o'clock a. m.

WILLIAM KRIEGER.

Sworn to and subscribed the foregoing return & affidavit by Wm. Krieger May 7th, A. D. 1891.

[Seal J. C. Burnett, Notary Public, Jeff. Co., Ky.]

J. C. BURNETT,
Not. Pub., Jeff. Co., Ky.

[Stamped:] Office Supreme Court U. S. Filed May 9, 1891. James H. McKenney, clerk.

Endorsed on cover: Kentucky court of appeals. No. 1615. The Louisville Water Company, plaintiff in error, *vs.* William Clark, sheriff of Jefferson county, Kentucky. Filed February 13, 1891.

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JAMES H. McKEN

Supreme Court United State

THE LOUISVILLE WATER CO., - - Plaintiff in Error,

VERSUS

WILLIAM CLARK,
Sheriff of Jefferson County, } - - - Defendant in Erro

**BRIEF OF PLAINTIFF IN ERROR ON DEFENDANT'S MOTIONS T
DISMISS, TO AFFIRM, AND TO ADVANCE.**

T. L. BURNETT AND
WILLIAM LINDSAY,
Counsel for Plaintiff in Err

H. M. LANE AND
J. C. BURNETT,
Of Counsel.

THE BRADLEY & GILBERT CO., PRINTERS, LOUISVILLE, KY.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY.
CLERK

1024

IN THE

Supreme Court of the United States.

LOUISVILLE WATER COMPANY, PLAINTIFF IN ERROR,

vs.

WM. CLARK, SHERIFF OF JEFFERSON COUNTY, KENTUCKY,
DEFENDANT IN ERROR.

Supplemental brief for deft. in error.

There was one point which we intended to suggest to the Court in the course of argument which we omitted, and on which, as it is not mentioned in the brief, we now offer this suggestion:

Great stress is laid by counsel for plaintiff in error on the rights of the *creditors* of the sinking fund of the city, and on the fact that to direct the city to cease paying for water furnished by the water company would impair the rights of these creditors, though the record does not show that there are any such creditors. We stated in argument that to show this to be to the *disadvantage* of these creditors would not show it to be to the *advantage* of the city, and that the latter is the point which must be proved in order to show, as is contended, that this was a contract made by the State for the benefit of the city. But now we desire to further suggest that in no event can the creditors of the sinking fund be injured by holding

this exemption invalid, because if the Court does so it will hold the entire act invalid, including section 1, which directs the water company to furnish water to the city free of charge; and this will leave all the parties standing just as they did before the act was passed, and the sinking fund can recover from the city for the water for which it has not paid. For it is perfectly well settled that where one part of an act is held invalid, the whole will fall unless it can be presumed that the Legislature would have passed one part without the other. (Cooley's Con. Lim., side page 178.) And if it be true that to stop payment for this water would impair the rights of creditors unless compensation is otherwise made, then it cannot be presumed that the Legislature would have ordered the stoppage if it had known the exemption was invalid. Therefore the whole act falls, and parties are left as before its passage. The creditors understand this, and hence we hear no complaint from them.

Or if this Court should hold that a valid exemption existed until repealed by the act of 1886, then assuming, as is contended by plaintiff in error, that the exemption was the consideration of the release from payment, the release would be inoperative after repeal of the exemption, and the sinking fund could certainly recover from the city for water furnished after the repeal.

The point urged in our brief as ground for dismissing the writ for lack of jurisdiction should probaby have been urged as a ground for affirming the judgment instead of dismissing the writ; and, if so, we hope the Court will so consider it.

JAMES P. HELM,
HELM BRUCE,
Counsel for Defendant in Error.

Supreme Court of the United States.

THE LOUISVILLE WATER CO., . PLAINTIFF IN ERROR,

versus

WILLIAM CLARK, *Sheriff of Jefferson County,* . . . DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR ON DEFENDANT'S MOTIONS TO DISMISS, TO AFFIRM, AND TO ADVANCE.

SERVICE OF CITATION.

The defendant in error, or rather counsel for defendant in error, move to dismiss the writ of error herein for the supposed lack of service of citation within the time prescribed by the rule promulgated by this court, on the 26th of January, last.

It is not pretended the citation was not served upon the defendant in person within the prescribed time. But the claim is, the service was not *bona fide*, because, on the 6th of January, 1891, and, before the service, the defendant was found to be a lunatic, and his person and estate placed in the custody of a committee by the orders of Kentucky courts of competent jurisdiction.

Is this true? Has there been a valid inquisition of lunacy upon Wm. Clark, sheriff of Jefferson County, Kentucky? With

great confidence counsel for plaintiff in error answers, No. 1st, the record filed in support of this motion fails to show that any notice whatever of the charge or inquest of lunacy was served on Clark; and, 2d, it is shown by the affidavit of Dr. O. Everts, the Superintendent in charge of the private sanitarium in the State of Ohio, that Wm. Clark, sheriff of Jefferson County, Kentucky, was in said sanitarium in the State of Ohio, and was not in the State of Kentucky from the 8th day of May, 1890, to the date of the affidavit.

And we submit, upon the following authorities, that the proceedings of the Jefferson Circuit Court, filed by counsel, were and are null and void. Section 9, article 2, chapter 53, page 750, of the "General Statutes" of Kentucky enacts and provides that—

"No inquest shall be held unless the person charged to be of "unsound mind is in court, and personally in the presence of the "jury. The personal presence of the person charged shall not be "dispensed with unless it shall appear by the oath or affidavit of "two physicians that they have personally examined the individual "charged to be of unsound mind, and that they verily believe him "to be an idiot or lunatic, as the case may be, and that his condi-"tion is such that it would be unsafe to bring him into court."

The defendant in error was on, and before January 1, 1891, and has been continuously since at a private sanitarium in the State of Ohio, and has at no time since January 1, 1891, been inside the territorial limits of the State of Kentucky, and without any notice to him whatever, while and when he was not even actually or constructively within the territorial jurisdiction of the State itself, the proceedings to have the defendant in error adjudged a lunatic were instituted and prosecuted to a final conclusion in the Jefferson Circuit Court.

By section 12, article 13, of the Constitution of Kentucky, General Statutes, page 129, it is ordained that no one can be

deprived of his life, liberty, or property unless by the judgment of his peers or the law of the land. Under the statutes of Kentucky no appeal lies from an inquest of lunacy. The court is not authorized to entertain a motion for or grant a new trial; the inquest is final and absolutely conclusive upon the party judicially ascertained to be of unsound mind, and operates to deprive him of his liberty and of the possession, control, and management of his estate, and, when the consequences of the judgment are of this character, there can be but little doubt but that the judgment, to be effective, must be based on notice to, and opportunity by, the party to be affected of contesting his liability to such consequences.

Until the defendant in error was notified of and allowed an opportunity to defend himself against the accusation or charge of lunacy, the Jefferson Circuit Court was without jurisdiction to judicially declare him to be of unsound mind.

In Holeman *v.* Holeman, 80 Maine, 141, the court say:

"It is the opinion of the court that the defendant should have "had notice of the inquisition by the selectmen. It is true that "there is no express statute requiring such notice, but it is a well "settled rule of the common law that when an adjudication is to "be made which will seriously affect the rights of a person he "should be notified and have an opportunity to be heard."

In Hathaway *v.* Clark, 5 Pickering 490, the Supreme Court of Massachusetts say:

"A decree of a judge of probate that a person is *non coupos* "*mentis*, or appointing a guardian over him for that cause without "notice, is absolutely void, and when the probate records are ap- "parently entire and no loss of papers in the probate office sug- "gested, it can not be presumed, even after the lapse of thirty "years, that any decree was passed adjudging a person to be *non* "*compos mentis*, or any notice given which does not appear."

In the case of Chase *v.* Hathaway, 14 Mass., 224, the court say:

"That notwithstanding there is no provision in the statute "for notice to the party alleged to be of unsound mind, yet "until notice is given to and an opportunity offered the party "charged with being of an unsound mind to defend himself against "the charge, there is no jurisdiction in the court to judicially "determine him of unsound mind, and that a judgment with- "out such notice and opportunity is void."

In McCung *v.* Hooper, 12 Alabama, 826, the court say:

"These proceedings purport to be had on the application of the "friends of Patrick. The writ was issued and the jury certified "that he was incapable to transact business, that he was liable to "be imposed upon by designing persons, and that he was *non* "*compos mentis*. The verdict was returned with the writ, and "thereupon a guardian was appointed, the defendant, in error, to "take charge of his person and property. It does not appear that "George I. Patrick had any notice whatever of the time and place "of making this inquisition or that the jury saw him or made any "application or effort to see him. It does not appear that he had "any notice of the application to the court for the writ, or that he "had any notice of the action of the court on the return of the "writ, but the proceedings were *ex parti* merely, and by the judg- "ment of the Orphans' Court the defendant in error is invested "with the control of the property and person of Patrick. I think "it is a fundamental principle of justice essential to the rights of "every man that he shall have notice of any judicial proceeding "that is about to be had for the purpose of divesting him of his "property or the control of it, that he may appear and show to "them who sit in judgment of his rights that he has not lost them "by the commission of crime, nor should those rights be taken "from him by reason of any misfortune, that he has the right to "appear before the jury and the court and to show that he is not "insane, that he and his property should not be put in charge of "another is a self-evident truth and is denied by no legal authority.

"This being his right to appear and defend himself, the question "is what effect is the law to give to a proceeding that has denied "this right. . . . These authorities seem to be in accord "with the first principles of justice and are not opposed by any "authorities that have fallen under our observation. We there- "fore come to the conclusion that the proceedings of the County "Court in the nature of an inquisition and determining said Patrick "to be *non compos mentis* are void."

In the case of Shumway *v.* Shumway, 2 Vermont, 341, the court say:

"The statute of Massachusetts is very similar to ours, ex- "cept it does not direct notice to be given. But we find in "the case of Chase *v.* Hathaway the Supreme Court reverses a "decree of the Court of Probate because the judge did not notify "the person before appointing a guardian. The court said that "whether notice by the Commissioners was essential or not we "are clear that it ought to be given before the adjudication in the "probate and without it such adjudication is null and void. As "the apellant was not notified by the judge of probate and had no "opportunity of hearing before him, the proceedings were irregular, "and we are satisfied that there is error on the face of the record "and that all is null and void."

In Newcomb *v.* Newcomb, 13 Bush, 572, the Kentucky Court of Appeals say:

"No rule will be allowed to violate every principle of natural "justice by depriving the sane or the insane of the rights of per- "son or property without a hearing. Every one whose rights are "to be affected by a judicial proceeding must have his day in "court. This is one of the fundamentals of the law, and when a "judgment has been rendered without citation or summons there "must be some remedy afforded the party complaining."

In the case of Crow *v.* Meyerseick, 88 Mo., 414, the court says:

"The notice and information in writing in cases of this sort, "when the court is proceeding by way of and upon information "to hold its inquest of lunacy, unsoundness or incapacity of mind "are jurisdictional papers."

In re Hall, 7 Vesey, 261, Lord Eldon quashed the inquisition of lunacy for want of notice to the alleged lunatic.

In Brown *v.* Hummel, 6 Barr, 91, the Supreme Court of Pennsylvania say that—

"It is against the principles of liberty and common right to "deprive a man of his property or franchise while he is within the "pale of the Constitution and with his hand on the altar, and give "it to another without hearing and trial by due course and pro-"cess of law."

In the matter of Russell, 1st Barbour's Chancery Reports, 39, Chancellor Walworth says:

"The alleged lunatic, except in cases of confirmed and danger-"ous madness, to be judged of and provided for by the court in "the order for the commission, is entitled to reasonable notice of "the time and place of the execution of the commission and a "reasonable time to produce his witnesses before the jury, to re-"fute the charge of lunacy."

In the case of Newcomb *v.* Newcomb, 13 Bush, 544, the question arose as to the validity of a judgment rendered by the Louisville Chancery Court, in an action for divorce by H. D. Newcomb *v.* Cornelia W. Newcomb, who, at the date of the suit for divorce, was, and had been for years prior thereto, hopelessly insane and an actual imbecile, and who, at the date of the institution of the suit, was, and had been in a private sanitarium in the State of Massachusetts. Cornelia W. Newcomb was proceeded against as a non-resident of the State of Kentucky, constructively summoned to appear in the Louisville Chancery Court and make defence against the petition of her husband, H. D. Newcomb. The peti-

tion disclosed that Cornelia W. Newcomb was a lunatic. The divorce was sought on the sole ground that she was hopelessly insane. The Chancellor appointed a guardian *ad litem* for her, who made defence for her, and on a final hearing, the Chancellor, in 1871, rendered a judgment divorcing H. D. Newcomb from the bonds of matrimony with Cornelia W. Newcomb, and restoring him to the rights and privileges of an unmarried man. H. D. Newcomb having died in the year 1874, a question arose in the settlement of his estate as to the validity of the judgment in the divorce proceeding, and in the reported case referred to above, the Court of Appeals held the judgment in the divorce proceedings void for the want of a citation to and service of the same upon the lunatic wife.

In re Venanker, 2 Stockton 190, the Chancellor says:

"The alleged lunatic has the right to be present at the execu-
"tion of the commission, to make his defence by himself or coun-
"sel, and to examine witnesses. The effect of the finding against
"him is to deprive him of the control of his property and of his
"personal liberty. Such consequences cannot follow except upon
"the verdict of a jury, and no such verdict should be permitted
"to pass against any man without affording him an opportunity of
"defending himself."

Under the statutes of Kentucky, the Jefferson Circuit Court was without jurisdiction to hold an inquest upon the sanity of the defendant in error, unless he was in court. The statute further requires that the person charged with being unsound in mind shall in person appear before the jury, the personal presence of the person so charged with being of unsound mind may, on certain conditions, be dispensed with—yet the provision that such an one must be in the court trying him, actually or constructively, remains unaffected by any proviso, as a jurisdictional fact, and on the 6th day of January, 1891, when the defendant in

error was not constructively or actually in the Jefferson Circuit Court, when he was, in fact, not within the State of Kentucky, without any notice to him whatever, without affording him an opportunity to defend, the Jefferson Circuit Court holds an inquest upon his sanity, and judicially determines him to be of unsound mind. The court was without jurisdiction, and the judgment and proceedings on the inquest void, and the plaintiff in error submits that on the showing made, that there is no ground for the imputation to it of bad faith, in not recognizing as valid the proceedings in the Jefferson Circuit Court, which were, beyond all questions of doubt, absolutely void.

But, if the inquest was valid and binding, though without notice to Clark, or service upon him, and though at the date of the supposed inquest Clark was not within the jurisdiction of the Jefferson Circuit Court, or in the State of Kentucky, yet the service of the citation in this case upon Clark in person was not void, but valid.

As the motion for the writ of error had been argued, both orally and by printed briefs, and such motion was pending at the time of the announcement of the rule in question, it may well be doubted whether it applies in this case. The service of citation was not necessary to give this court jurisdiction of this writ of error. The justice to whom the application was made, suggested that it should be heard by the full bench sitting as a court. It was so heard. The defendant in error appeared and resisted the application, and was, for all purposes in court, when the writ was allowed. The office of the writ of error was the removal of the cause from the Court of Appeals of Kentucky to this court. The office of the citation was to give notice of the fact that the writ had been allowed, and the cause removed. The defendant in error had the same notice of the writ, and of the removal of the cause, that the successful party in a suit in equity or in an admiralty proceeding has, when the appeal is prayed, allowed, and

perfected in open court, at the same term at which the decree is rendered.

It may well be said in response to defendants, as was said in United States *v.* Gomez, 1 Wallace, 701:

"Object of the citation is notice, and under the circumstances "of this case that purpose seems to have been fully answered, and "the objection is accordingly overruled."

In such a case as this there can be no substantial difference in the rules of this court applicable to writs of error and appeals. The statute provides that:

"Appeals from the circuit courts, and from district courts acting "as circuit courts, and from district courts in prize causes, shall be "subject to the same rules, regulations, and restrictions, as are or "may be prescribed in law in cases of writs of error." (Section 1012, Revised Statutes).

We take it, the granting of the writ of error by the court, after the appearance of the successful party in the State court, affords like notice with the granting of an appeal by the Circuit Court at the same term at which the decree is rendered.

On the 5th of January, 1891, pending the motion for the writ of error, this court made an order directing counsel on or before the third Monday of that month, to file printed briefs upon the question of the existence of the contract, the impairment of which was claimed to justify the issuance of the writ applied for.

Prior to the said third Monday of January (19), thirteen days after Clark had been adjudged a lunatic, and his person and estate committed to the care of a guardian, the counsel, who are now calling in question the good faith of the service of the citation, filed their brief in obedience to the order aforesaid, and made no mention whatever of the fact that their client had been adjudged a lunatic, and placed under the charge of a committee. It may be

that counsel were at that time as ignorant of the inquisition and the appointment of the committee as the Water Company and its counsel were at the time they caused the citation to be served upon the defendant in error. If counsel were then apprised of the inquisition and the appointment of the committee, and forebore to give notice thereof, either to this court or to the plaintiff in error, it comes with ill grace on their part to charge now that the service of the citation was not *bona fide*.

SERVICE SUFFICIENT.

Whilst the citation might ordinarily have been served upon the counsel for defendant in error, it is not the case where the defendant has become a lunatic, because the relation of client and attorney ceased on the 6th of January, 1891, if the inquest was valid. Mecham on Agency, section 888, as to duration of authority of counsel and how terminated:

"Thus the death of the client, his insanity, or his bankruptcy, "would undoubtedly dissolve the relation. So the death of the "attorney, his insanity, his disbarment, or his removal from the "State, would effect the same result." (Weeks on attorneys, sec. 256. Wharton on Agency, sec., 108, 234).

In this case if appearance to the notice in this court by counsel did not create an attorney of record the defendant could hoave had none of record until after the record was sent up in obedience to the writ of error, and not then, if the inqusition of lunacy be valid.

Yet the service upon the defendant in error is sufficient, even if it should be admitted that he had theretofore been adjudged a lunatic and placed in custody of a committee, and that these facts were known to the plaintiff in error and its counsel.

An idiot or lunatic may be sued at law after a commission of lunacy and after he has been placed under guardianship, and

this by a party who has knowledge of all the facts. (Sternberg *v.* Schoolcraft, 2 Barbour 155; Johnson *v.* Pearce, 31st Ohio, Reports, 248).

Insane persons under guardianship continue liable to suits and notification by service of citation. (Ingersoll *v.* Harrison, 48 Michigan, 234; Crippen *v.* Culver, 13 Barbour, 424; Bush *v.* Pettibone, 4th Comstock, 300).

It was the rule in England at the time the rules of this court were adopted. (Nutt *v.* Verney, 4 Term Reports, 421; Ibbitson *v.* Lord Galway, 6 Term Reports, 133. Bacon's Abridgement, vol. 5, p. 47, Title Idiots and Lunatis).

In the case of Allison *v.* Taylor, 6 Dana 88, the Court of Appeals of Kentucky, through Chief Justice Robertson, say:

"The only question presented in this case is whether a judg-
"ment by *default* against a *lunatic* upon service of process on him
"alone is *void* because his committee was not made a party. We
"would not, in the absence of any direct authority, feel authorized
"to decide that a judgment by default against a *lunatic* is *void*
"merely because his committee was not a party and no person
"was appointed to defend the suit. Moreover, this conclusion
"seems also to be established by the authority of adjudged cases.
"(Shelford on Lunacy.) This is not a case, as we think it, in
"which it should be decided that there was in the judgment of law
"or fact *no notice whatever* of the suit, and therefore the judgment
"should not be deemed *void* for want of *any citation.* Irreparable
"injustice can seldom if ever result from the recognition of such a
"doctrine because official service on a lunatic will generally be in-
"direct personal notice to his committee or keeper or some other
"friend."

In Cameron *v.* Pottinger, 3 Bibb, 11, the Court of Appeals of Kentucky say:

"Were the point unsettled by any authority, there would be
"little doubt upon general principles that the committee of an

"idiot or lunatic could not maintain an action as the present. "The committee having the custody of the person and the estate "of the lunatic or idiot may, like a bailee, have a special property "in the estate committed to their care, and may, as the bailee can, "maintain an action for an injury done to their possession. But "further than this their right can not be admitted to extend, and "upon no known principle of the common law can a person main- "tain an action upon a deed or other instrument of which he has "the possession as bailee. The law, out of compassion to his in- "firmities, guards with peculiar care the interest of the idiot or "lunatic, but it does not divest him of his rights. He is capable, "notwithstanding the commission of idiocy or lunacy, not only of "holding property but of acquiring it either by descent or pur- "chase, and when the law gives the right of property it gives as "an inseparable concomitant the right of action. But a recur- "rence to general principles is not necessary to enable us to de- "cide the point made in this case. It has been settled for ages. "By a uniform and uninterrupted current of authorities from the "time of Fitzherbert to the present period it has been established "that an idiot or lunatic may sue and be sued."

In the case of Cram *v.* Anderson, 3 Dana, 120, the Court of Appeals of Kentucky say:

"It is well settled as the general doctrine of the law, that for "the property of the lunatic or for an injury to that property, an "action should be brought in the owner's name and not in that of "his committee."

In Harrison *v.* Rowan, 4 Washington, C. C., 207, Justice Washington says:

"A lunatic, as well as an infant, though both are incompetent "and may be equally so to act for themselves, must, in cases where "their interest are sought to be affected by the decree, be made "parties to the suit, and if as defendants this can only be done by "praying process against them. In the latter case the court ap- "points a special guardian to defend him in that suit and he

"answers the bill by the guardian so appointed. A lunatic against "whom process is issued answers by his committee under an "order of the court appointing him for that purpose. If he has "no committee, the court appoints some person as guardian to "defend the suit and to answer for the lunatic."

In Johnson *v.* Pomeroy, 31 Ohio State, 241, the Supreme Court of Ohio says:

"An insane person may be sued, and jurisdiction over his "person acquired by like process as if he were sane. But when "it is made to appear to the court that a party to the suit is "insane, it is made the duty of the court, by statute, to appoint "a trustee to prosecute or defend the suit for and on behalf of "such insane party; and, indeed, before the the statute, it was "the duty of the court to appoint a guardian *ad litem* for an "insane party. (Stugis *v.* Longworth, 1 Ohio State, 554). And "no doubt it is the duty of the plaintiff who sues an insane per-"son, if he has knowledge of the insanity, to inform the court "thereof. But the failure to perform any of these duties does "not affect the jurisdiction of the court, but only the regularity "of the proceedings. Therefore, it is that, the judgment of the "court having jurisdiction of the subject matter of the suit and of "the person of such party, notwithstanding such irregularity is "not absolutely void."

In the case of Sturges *v.* Longworth 1 Ohio State, 554, the Supreme Court of Ohio says:

"That the same principle governs in the case against a lunatic, "as in a case against a sane person, that in each case it is the ser-"vice of process that confers the jurisdiction."

In the case of Ingersoll *v.* Harrison, 48 Michigan, 235, the Supreme Court of Michigan says:

"The sole question raised is, whether the existence of the "guardianship took away the defendant's legal capacity to be "served with summons, and we think it did not. He continued

"liable to suits, and liable to notification of their institution. "(Sternberg *v.* Schoolcraft, 2 Barb , 153, and authorities cited; "Crippen *v.* Culver, 13 Barb., 424. See also Bush *v.* Pettibone, 4 "Comstock, 300; Ibbitson *v.* Lord Galway, 6 Term, 133; Cock "*v.* Bell, 13 East, 355."

Freeman on Judgments, section 152, says:

"While an occasional difference in opinion manifests itself in "regard to the propriety and possibility of binding *femes-covert* "and infants by judicial proceedings in which they are not repre- "sented by some competent authority, no such difference has been "made apparent in relation to a more unfortunate and more de- "fenseless class of persons, but by a concurrence of judicial au- "thority, lunatics are held to be within the jurisdiction of the "courts. Judgments against them, it is said, is neither void nor "voidable, they can not be reversed for error on account of de- "fendant's lunacy. . . . . In a suit against a lunatic, the "judgment is properly entered against him and not against his "guardian. A lunatic has capacity to appear in court by attor- "ney. . . . . The judgment to be effective, can not, there- "fore, be against any other person than the lunatic."

In the case of Tomlinson *v.* Dover, 1 Gill, 349, where the citation was to and served on the lunatic alone, the Supreme Court of Maryland says:

"The view which we have taken of the question raised upon "the first point, reaches, controls, and determines all other ques- "tions in this cause. The judgments being good at law and no "objections made to the executions or sales under them in point "of form or substance, it follows as a necessary consequence that "the title passed by the sale to the purchaser, and the court "properly instructed the jury to find for the defendant,"

And the rule announced in Tomlinson *v.* Dover was cited with the approval and reaffirmed by the Supreme Court of Maryland in the case of Stigers *v.* Brent, 50 Md., 214.

In the case of Sternberg *v.* Schoolcraft, 2 Barbour, 155, Justice Parker, delivering the opinion of the court, says:

"An idiot or lunatic is liable to be sued at law after the execution of a commission of lunacy and after his person is placed "under the care of a committee. (1 Cowens' Treatise, 266, Bac. "Abr., title Idiots and Lunatics, D; 2 East., 104; 2 Tenn. Rep. "390; 4 Id., 121; 6 Id., 133; 2 Bos. and Pul., 362; 12 Ves., "385; 13 Id., 590; 6 Wend., 497.) And an idiot or lunatic must "sue and be sued in person, though the court will permit his "committee to assist in managing the prosecution or defense. "(Faulkner *v.* McClure, 18 Johns' Rep., 134; Steller, 3 Paige, "200) . . . . . I have shown that the fact that the defendant was a lunatic when sued, formed no defense, and was not "even a ground for setting aside the proceeding or reversing the "judgment on error."

In the case of Clark *v.* Dunham, 4 Denio, 262, where a judgment had been recovered against a lunatic in an action at law after he had been judicially ascertained to be such, and on a citation to and service upon the lunatic alone, the court says:

"We do not think the proceeding irregular. The committee "should apply to the Court of Chancery. (Robertson *v.* Pain, 19 "Wend., 649.")

In Walker *v.* Clay, 21 Ala., 807, the Supreme Court of Alabama, says:

"An idiot should also appear in person, and it is said that any "one who can make a better defense shall be admitted to defend "for him, but a lunatic, or one who becomes *non compos mentis*, "must appear by guardian if he be within age and by attorney if "he be of full age. (1 Chitty's Pl, 469; see also, 2 Sannd., 333, "Note 4, 335; Bacon's Abr. title Idiots and Lunatics.) In the "case of Buchanan *v.* Rout, 2 Monroe, 114, the court decided "that lunatics within age must appear by guardian, those of mature age, by attorney. To the same effect, also, is Amos *v.*

"Taylor, 2 Brevard, 20, and also in Allison *v.* Taylor, 6 Dana, 87, "it was held that a judgment against a lunatic in a case where the "process was served upon him alone, and the judgments rendered "by default, was not void."

In the case of McAllister *v.* Lancaster, 15 Nebraska, 295, the court says:

"A court, by the service of its summons acquires jurisdiction "of the person of an insane defendant and the failure to appoint "a guardian *ad litem*, when the general guardian fails to appear "and defend does not render the judgment either void or void-"able."

In the case of Weber *v.* Weiting, 3 C. E. Green, 444, the Chancellor says:

"An action at law can be maintained against a lunatic and the "judgment against him is valid, (Shalford on Lunacy, 395; Kunot *v.* "Norman, 27 R., 390; Nutt *v.* Verney, 4 T. R., 121; Robertson "*v.* Pain, 19 Wend., 650.) If a personal suit can be maintained at "law against a lunatic there is no reason why a proceeding against "his estate by attachment is not valid."

In the case of Henry *v.* Brothers, 48 Penn. St., 71, the Supreme Court of Pennsylvania held that a judgment in an action at law against a lunatic on a citation to and service upon the lunatic only was not void or voidable on the ground of lunacy.

In *ex parte*, Leighton, 14 Massachusetts, 207, the court say:

"The person to whom as a *non compos* the judge of probate "has appointed a guardian is still liable to be sued in a civil action "and to be committed in execution."

In the case of Scott *v.* Winningham, 79 Georgia, 492, the court say, that:

"Judgment in favor of the creditor of a lunatic on a contract of "the latter can not personally affect him unless process is served "upon him to make him a party."

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In Davis *v.* Norvill, 87 ~~Tenn.~~ Term R 36, the court say, that:

"One *non compos mentis* may prosecute a writ of error from the "decision of the court declaring him to be of unsound mind."

In Boyce *v.* Bergman, 123 Indiana, 451, the court held that:

"A judgment is not vulnerable upon collateral attack on the "ground that the party against whom it was rendered was of un- "sound mind."

In the case of Speck *v.* The Pullman Palace Car Company, 121 Illinois, 33, the court held that:

"A judgment in partition is neither void nor voidable merely "because one of the plaintiffs is a lunatic."

In the case of Hinton *v.* Bland, 81 Virginia, 588, the court held that:

"It was not necessary to appoint a guardian *ad litem* for an "insane defendant unless there is no committee, or the committee "has a conflict of interest with the lunatic."

In Cornick *v.* Paddock, 20 Nebraska, 486, the court held that:

"A court by the service of its process acquires jurisdiction "over the person of an insane defendant, and that the failure to "appoint a guardian *ad litem* does not render the judgment either "void or voidable." (See Black on Judgments, section 205; Beverly case, 4 Coke, 123; 12 Coke, 124; 33 Maine, 114; 29 N. H., 299; 63 Penn. St., 320; 99 N. C., 483; 23 Georgia, 163, 170; 63 Texas, 88; 111 Indiana, 433; 81 Mo., 610; 53 California, 737.)

The contention of the defendant in error that, because of his lunacy the service of the citation upon him did not operate to confer jurisdiction of his person upon this court, is sustained by reference to no authority or adjudged case; the authorities are all to the contrary, and, besides, it is utterly impossible to conceive of a case where the service of the citation upon the attorney of record

would, but where service of the citation upon the party himself would not, confer jurisdiction. Until the court has jurisdiction of the person of the defendant in error, no guardian *ad litem*, or committee can be appointed to defend for him; these are all subsequent proceedings and never take place until after the jurisdiction has first attached.

But to this action the defendant in error is a party only in his official capacity as sheriff of Jefferson County, and his official character and powers remain unaffected by the inquisition of lunacy. The defendant in error is still the sheriff of Jefferson County, and the service of citation could be had alone on the sheriff.

In the case of De La Lande *v.* The Treasurer, 17 Howard, 93, Chief Justice Taney, delivering the opinion of the court, said:

"The citation must be directed to the party on record, and "served on him, and when an officer of the State is the party "prosecuting the suit for the State the citation must be served "on him. In this case a notice or citation on the Chief Execu- "tive Officer or Attorney General would not be sufficient, for "the Treasurer is the person who has obtained the judgment "and has a right to receive the money. He is the actor, the "plaintiff in the suit, and the Chief Executive Officer and At- "torney General do not represent him, and may or may not "support his proceeding. This rule of practice has been uni- "formly followed in this court. There have been many cases in "which an officer of the State, acting in behalf of the State, has "been one of the parties, and the tenth rule has never been "applied to a case of that kind, and the citation has always "been served on the officer, whether conducting the proceed- "ings in his own name or that of his office. The practice is "founded upon the language of the act of 1789, ch. 20, which "directs the 'adverse party' to be cited on a writ of error or "appeal. The 'adverse party' is the one which appeared in the "suit, and who prosecuted or defended it, and in whose favor "the judgement was rendered, which the plaintiff in the writ of "error seeks to reverse."

In the case of the United States *v.* Clark, 20 Wallace, 92, this court say:

"The return of the marshal, which shows an exact compli-"ance with the order of the court, directing service and the "manner in which it should be made, establishes sufficient ser-"vice."

We therefore submit that the service of the citation upon the defendant in error, even if he was judicially found to be of unsound mind, was perfectly proper, legal, and sufficient; and second, that if the defendant in error was judicially ascertained to be of unsound mind, that in no way affected his official capacity or powers, and that his committee did not and could not succeed to them, and that the defendant in error was a party only in his official capacity as the sheriff of Jefferson County, Kentucky; and third, that the alleged inquest by the Jefferson Circuit Court upon the sanity of the defendant in error was void for want of jurisdiction in that court.

The third rule of this court is these words:

"This court considers the former practice of the Court of "Kings Bench and of Chancery, in England, as affording outlines "for the practice of this court, and will, from time to time, make "such alterations therein as circumstances may make necessary."

No special rule has been made as to how citations shall be served where the defendant in error is a lunatic and under guardianship. Therefore, the English rule, and the rules prevailing in the American States, where there are no statutory regulations, must be the rule of this court.

Further Citation.

If the committee having charge of the lunatic and his estate, desires to appear and represent his ward in this court, the plaintiff

in error will interpose no objection. If, under all the circumstances of the case, this court shall be of opinion the citation should be served upon the committee, then we ask that an *alias* citation be issued, and that opportunity be given the plaintiff in error to have the same served as this court may direct.

We suggest, in this connection, that the defendant in error has no personal interest in the controversy. The taxes in contest constitute no part of his estate. Counsel who appear here as the representatives of the supposed lunatic, are in fact representing the State of Kentucky, and this, no matter how or by whom they were retained. The motion to advance this case confirms this conclusion. Therefore, we insist there is no necessity for the presence of the committee, and that the question whether Clark is or not a lunatic is altogether immaterial.

Motion to Affirm.

As to the matter of jurisdiction, this question must have been considered and decided when the writ of error was awarded. This court will treat the record now before it as showing everything of which the State court was bound to take notice. That court was bound to take notice of the Kentucky Revenue Act of May 17th, 1886. (Kentucky General Statutes, ed. 1888, page 1034.) The provisions of that act claimed to be in conflict with the amendment to the charter of the Water Company, constituting the contract of April 22nd, 1882, are, first, article one, section one, page 1034, in words and figures, as follows:

"That an annual tax of forty-seven cents upon each one hun-
"dred dollars of value of all real and personal estate directed to
"be assessed for taxation, due and payable the fiscal year assessed,
"shall be paid by the person or owner assessed."

"The aggregate amount of tax realized by all assessments
"shall be distributed as follows: Twenty cents for the ordinary

"expenses of the government; five cents for the use of the sinking fund, and twenty-two cents for the support of common schools."

Second. Section 3, page 1035:

"All property, real and personal, within this State, not herein expressly exempt by law, shall be assessed, as nearly as practicable, according to a uniform rate, in the manner hereinafter provided."

Section 3, page 1036:

"Real estate for the purpose of taxation shall include all lands within this State, and in assessing said lands, the assessor shall take into consideration its increased value on account of all the improvements thereon."

Third. Section 9, page 1036:

"The following property shall be exempt from taxation:

"1. Property of the United States and the securities thereof, which are, by act of Congress, exempt from taxation.

"2. Property of the Commonwealth.

"3. Cattle of the value of fifty dollars; all crops that are raised in the year in which the assessment is made; articles manufactured in the family for family use; all poultry raised for family use, and the provisions on hand for family use.

"4. Property owned in its entirety by counties, cities, and towns, which is necessary to carry on the government of such county, city, or town.

"5. Public schools, churches, and all property of seminaries, asylums, hospitals, infirmaries, and colleges, and all other funds devoted to charitable purposes, and church parsonages, public cemeteries, except those owned by joint stock companies or associations which declare a dividend: *Provided*, That nothing herein shall be construed as exempting any property which is used or employed for gain of any person, nor any property of which the products, rents, or uses are not devoted solely to the

"objects of the institution, as contradistinguished from personal "gain of the individuals connected with the institution: *Provided*, "Nothing herein shall be construed or held to include any house, "lot, land, fund, or other property of any insurance or assurance "company. Libraries, paintings, and statuary owned by coun- "ties, cities, and towns are likewise exempt from taxation.

"6. All property which is maintained by general State taxa- "tion."

Section 3, article 4, page 1045:

"It shall be the duty of the president, treasurer, or secretary "of any gas or water company or association in this State, to re- "port under oath to the assessor, on or before the fifteenth day of "September in each year, as of that date, a full and complete "statement of all property, real, personal, or mixed, including "buildings, engines, machinery, pipes above and below ground, "reservoirs, retorts, tanks, meters, lamp-posts, together with any "and all species of property connected with or in any way belong- "ing to or under the control of such gas or water company, and "any surplus or accumnlated or contingent fund on hand, cash on "hand, stocks, bonds, or other securities, and the total cash value "thereof."

Article 12, section 5:

"Chapter 92 of the General Statutes; the act of March 28, "1872, entitled An act to amend chapter 83 of the Revised Stat- "utes, titled Revenue and Taxation; the amendment to said act "of March 28, 1872, entitled An act to amend an act approved "March 28, 1872, authorizing sheriffs to sell real estate to pay "revenue tax, approved April 19, 1873; the act approved April "2, 1878, title, An act to amend section 6, article 6, chapter 92, "General Statutes; An act to amend article 2 of chapter 92 of the "General Statutes, title Revenue and Taxation, approved May 8, "1884, and all other acts general and special, and parts of acts "inconsistent herewith, or not in conformity herewith, are hereby "repealed, but nothing in this act shall interfere with any local "option or any special prohibition law, nor with any local or gen-

"eral law for creating or collecting county levy, or with chapter "1315 of the acts of 1879–80, or with 'An act for the benefit of "the branch penitentiary at Eddyville,' approved April 7, 1886."

The opinion in Murray *v.* Charleston, 96 U. S., 442, establishes that it is not necessary that the record shall show in direct terms that the validity of a State statute was questioned in the State court. That the State court was bound to take notice of the statute, and that the case could not have been decided without the consideration thereof, is sufficient to give this court jurisdiction.

Mills *v.* Brown, 16 Peter, 528, shows that this court will treat as inferable from the rec rd, all the laws of which judicial notice must be taken. Counsel in their brief assume that this court in allowing the writ of error did so on the theory that the Court of Appeals had given effect to the act of 1886. This theory is conclusive of the question of jurisdiction. And, in as much as the act of 1886 repealed all laws authorizing any property in Kentucky to be taxed for State purposes, and substituted its provisions for all antecedent tax laws, the taxes in contest could not have been imposed under any other statute than that of 1886.

But this court may also have held, that the levy and assessment of the taxes upon the property of plaintiff in error and the seizure of such property in order to enforce the collection of the taxes, was the exercise of an authority under the State, as well as by the State, impairing the obligations of the contract of April 22, 1882, and that the jurisdiction of this court arose out of that fact. This view was fully discussed in the printed suggestions we had the honor to file in this court on the motion for the allowance of the writ of error, to which suggestion we respectfully refer.

Supposed Repeal of the Act of April 22, 1882.

On page 5 of their brief counsel say:

"It is plain that the only question for this court to consider "is, did the Legislature posses the power to adopt a statute "repealing the act of exemption?"

They answer that question by referring to the Kentucky act of 1856, which provided:

"That all charters and grants to corporations, and amend- "ments therof, enacted subsequent to the 14th day of February, "1856, should be subject to amendment or repeal, unless a con- "trary intent be therein plainly expressed. That statute, how- "ever, contained a proviso, that whilst privileges and franchises "so granted may be changed or modified, no amendment or "repeal shall impair other rights previously vested." (Section 8, chapter 68, Ky. Gen. Stat.).

A charter or grant to a corporation may not only confer privileges and franchises, but may also involve a contract between the State and the corporation, wholly different from the character of contract considered by this court in the Dartmouth College case. The contract growing out of the acceptance of a charter and the organization thereunder is one thing; a contract touching some collateral subject in which the State has an interest, and the terms and eonditions of which the State may set out in the act incorporating the proposed corporation, is an entirely different thing.

By the act of 1856, now section 8, chapter 68, of the General Statutes, the State reserved the right to amend or annul the charters of corporations, so far as they may relate to corporate privileges and franchises. But no right was reserved to annul or change a contract between the State and the corporation relating to matter in which the State has an interest collateral to, and

wholly disconnected from, the grant of the corporate franchises and privileges.

In 1868 the General Assembly of Kentucky incorporated the Green and Barren River Navigation Company, and conferred upon it such corporate powers and privileges as were deemed necessary to enable it to carry out the purposes of its creation. By a provision of the act of incorporation the State leased to the corporation for the period of thirty years the Green and Barren River line of navigation. After the organization of the corporation it complied with the condition of the proposed contract of lease, and took and held possession of the improvements for a number of years. In 1880 the Legislature passed an act to repeal in part the act incorporating the company. The repeal applied to so much of the act as leased and conveyed to the Navigation Company the Green and Barren River line of navigation, and the benefits of tolls and revenues arising therefrom. The repealing act also provided that the company should surrender the line of navigation to the Commissioners of the Sinking Fund. A refusal to surrender was followed by an action to recover the possession. An appeal brought the controversy into the Court of Appeals. The right to enact the repealing statute of 1880 was claimed under the powers reserved by the act of 1856. The existence of such power was denied by the Court of Appeals. (The opinion of the court will be found in 79 Ky. Rep., commencing page 75.)

After disposing of several questions much pressed in the argument, the court said: The Act of Incorporation embodied the terms of a contract, whereby, upon certain valuable considerations, the State leased its property to the Navigation Company. That up to 1880 the latter had complied with every stipulation required to be performed on its part. And without any other reason than the alleged power of the Legislature to disregard such contracts at its will and pleasure, the company is called on to sur-

render its control over these improvements and the benefits arising therefrom, without any compensation whatever. And then the court declared, that "the repeal of this part of the company's charter can not be held to have divested it of any of its rights or impair the validity of the contract under which these rights are asserted." (Page 81.)

The right of the State to assume the control of the line of navigation by the exercise of the power of eminent domain, and the payment of fair compensation was fully recognized, but the court added, "we can not consent to a doctrine that will allow the State to alter or abolish such contracts whenever in the opinion of the Legislature the necessities of the public or the interests of the State require it." In its conclusion, on page 83, the court used this language: "The only question is, had the Legislature the power to annul the contract? We think not, and must adjudge that the act of the 8th of April, 1880, is unconstitutional and void. The charter of the appellee has not been repealed, but only so much of it as relates to the lease, and if there had been a repeal of the charter by reason of the statute of 1856, the provision of the first section of that act, 'that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested,' would secure to the appellee its rights under the lease. The right of the appellee to the tolls and benefits of this line of navigation originated from the contract made with the State, and any legislation impairing its obligation without the consent of the appellee is a violation of the Constitution."

Counsel for defendant in error argue that, as this court ruled in Greenwood *v.* The Freight Company, in 105 U. S., 613, that by the laws of Massachusetts the right and power to repeal the charter in that case was reserved to the State, and there being no substantial difference between the statute of the State of Massa-

chusetts of March, 1831, and the statute of Kentucky of 1856, therefore, the right to repeal the act of 22d of April, 1882, was reserved to the State of Kentucky; and counsel then, on page 8 of their brief, proceed to paraphrase the act of 22d of April, 1882, by inserting section 3, so as to read as follows:

"Sec. 1. That it shall be the duty of the Louisville Water "Company to furnish water to the public fire cisterns and public "fire plugs or hydrants of the city of Louisville for fire protec- "tion, free of charge.

"Sec. 2. The Sinking Fund of the city of Louisville, being the "owner of the stock of the Louisville Water Company, and said "Water Company, by virtue thereof, is the property of the city "of Louisville, therefore the Louisville Water Company is hereby "exempted from the payment of all taxes of all kinds of what- "ever character, State, municipal, and special.

"Sec. 3. This statute shall be subject to amendment or repeal "at the will of the Legislature.

"Sec. 4. This act shall take effect from and after its passage."

If counsel had extended their paraphrase, and included as a part of the added section the following part of said act, to-wit: "*Provided, that whilst privileges and franchises so granted may* "*be changed and repealed, no amendment or repeal shall impair other* "*rights, previously vested,*" the scope and extent of the subject would have been more fully understood.

It will be seen that there is a wide difference between the statute of Massachusetts and the statute of the State of Kentucky. As expressed by Mr. Justice Field, in 110 U. S., page 182:

"The object of the reservation, in whatever form expressed, "was to preserve to the State control over the corporate fran- "chises, rights, and privileges, which, in her sovereign or legis- "lative capacity, she called into existence; in other words, to "enable her to annul or modify that which she had created. It "was not its object to interfere with contracts, which the cor-

"poration, when once created, might make, nor with the prop-
"erty which it might acquire."

And in New Jersey *v.* Wright, 117 U. S., 1024, Mr. Justice Bradley said:

"But where it is charged that the obligation of a contract has
"been impaired by a State law, as in this case by the General
"Tax Law of the State of New Jersey, as administered by the
"State authorities and the State courts, justify such impairment
"by the application of some general rule of the law to the facts
"of the case, it is our duty to inquire whether the justification is
"well grounded. If it is not, the party is entitled to the consti-
"tutional protection."

In the case of Louisville, &c., *v.* The Commonwealth, 10 Bush., 47, the Kentucky Court of Appeals say:

"The Legislature may create corporations, whereby certain
"liabilities and duties are assumed by the latter, and in consider-
"ation of which rights and privileges are granted that no legisla-
"tion without the consent of the parties interested can impair or
"diminish. In such cases, the expectation of benefit to the pub-
"lic is the moving consideration on the one side, and that of ex-
"pected remuneration for the expenditure, on the other."

In other words, the rule is here announced that the charters, amendments, grants, privileges, and franchises allowed by the State to corporations in expectation on the part of the State of a benefit to the public, and in expectation on the part of the corporation of a remuneration for its expenditures, are not subject to revocation or repeal by the State at its pleasure, under the provisions of the 8th section of chapter 68 of the General Statutes.

In the case of Covington *v.* Covington, 10 Bush, 76, the Kentucky Court of Appeals say:

"It is settled by an unbroken chain of authority that the
"charter of a private corporation may vest such rights in the cor-

"poration and stockholders that no subsequent legislation can "impair or diminish."

In the case of Commonwealth *v.* Essex, 13 Gray, 239, the court say:

"When, under a power in a charter, rights have been acquired "and become vested, no amendment or alteration of the charter "can take away the property or rights which have become vested "under a legitimate exercise of the powers granted. (Railway "Company *v.* Maine, 96 U. S., 499; Detroit *v.* Detroit, 43 Mich., "140; People *v.* O'Brien, 111 N. Y., 1.")

It will be seen that the repeal or revocation affected by the act of the 17th day of May, 1886, leaves in full force that provision of the act of the 22d day of April, 1882, which enacts "that it shall be the duty of the Louisville Water Company to furnish to the public fire cisterns and public fire plugs or hydrants of the City of Louisville, water for fire protection free of charge," and that from the performance of this duty the plaintiff is not released by the repeal attempted, but that, on the contrary, the plaintiff in error is bound and remains bound for all damage that would result from a failure on its part to furnish to the public fire cisterns, plugs and hydrants of the City of Louisville water for fire protection free of charge, has been held by the Kentucky Court of Appeals on the 5th of December, 1889, in the case of Paducah Lumber Company *v.* Paducah Water Supply Company, 11 Ky. L. R., 738, and on December 10th, 1889, in Duncan *v.* Owensboro Water Company. In the case of Lumbard *v.* Stearns, 4th Cushing, 60, the Supreme Court of Massachusetts held that the failure of the Water Company to furnish and supply water as provided in its charter would be a plain abuse of its franchise, and that by accepting the act of incorporation it impliedly undertook to perform all the public duties required by it, and this court, in the case of

the Spring Valley Water Works *v.* Schottlin, 110 U. S., 347; held the same rule; 91 U. S., 343; 3rd Dillon C. C., 515; 4 Dillon C. C., 499; 113 U. S., 424; 97 Penn. St., 554; 56 Ills., 365; 29 Conn., 538; High on Extraordinary Legal Remedies, 431, 433; 34 Ohio St., 572; 69 Indiana, 199; 36 Ohio St., 296. If it be then that the power reserved under section 8, chapter 68, of the General Statute gives to the State the power to revoke the grant of immunity and at the same time retain the consideration for the grant, then the act of 1856 confers a power upon the State that has been at all times and by all courts since the Magna Charter denied to the sovereign.

But, again: Is the immunity guaranteed by the act of April 22d, 1882, such a charter, or amendment thereof, or grant, franchise, or privilege, as is within either the letter or spirit of the act of 1856? Is not the act of April 22d, 1882, merely a contract between the State and the Water Company? It has been repeatedly held by the court that certain provisions in the charters of private corporations collateral to the grant of the charter conferring immunities and franchises absolute in their terms, constitute contracts on the part of the State, and were beyond the control of the State under a reservation of power, to revoke, alter, and amend, and must be regarded as irrevocable rights protected by the Constitution of the United States.

Morawetz in his work on Private Corporations, section 1055, say:

"Any right, privilege, or immunity conferred upon a body of "corporators by the Legislature of the State, in the exercise of "its power to bind the State by a contract or treaty, and not "merely in the exercise of its law-making power, is binding upon "the State, and can not be impaired by subsequent legislation. "If the right, privilege, or immunity was conferred by the State "in the charter under which the corporation was formed, or sub- "quently, for a valid consideration, it will usually be held that it

"was intended by the Legislature as an irrevocable grant. Thus, "it has been repeatedly held that an exemption from taxation "conferred upon a corporation by its charter is binding upon the "State, and can not be impaired by subsequent legislation. So, "if the liability to taxation is limited by the charter to a certain "amount, it can not be subsequently increased."

In the case at bar, the State by the act of April 22, 1882, in consideration of the undertaking of the plaintiff in error during its corporate existence, to furnish and supply to the public fire cisterns, hydrants, and plugs in the city of Louisville water for fire protection, free of charge, guaranteed to the plaintiff in error an immunity from taxation. The plaintiff in error has, at all times, since April 22d, 1882, fully and faithfully complied with its undertaking, and the State is invested with ample powers to compel the plaintiff in error in the future to fully comply with its undertaking as set out in that act; and, notwithstanding this fact, it is insisted by the State that it has revoked, and had the right under section 8, chapter 68 of the General Statutes, to revoke this immunity from taxation, in consideration of which the Louisville Water Company undertook the performance of this public service. The principles upon which the constitutional limitation upon the power of a State to impair the obligation of a contract is administered and applied, embrace "all contracts executed and exe- "cutory, whether between individuals, or between a State and "individuals, and a State has no more power to impair an obli- "gation into which she has entered, than she can the contracts of "individuals." (8 Wheaton, 93). Further than this, when a State becomes a party to a contract, the same rules are applicable to her as a private person under like circumstances. 13 Wal., 232.

The act of April 22, 1882, was clearly passed by the Legislature in the exercise of its power to bind the State by contract, and not merely in the exercise of its law-making power, and

when this is the case it manifests and expresses an intention that the power of revocation shall not exist on the part of the State, otherwise the State under the power of revocation could divest vested rights of property. In the case of Orr *v.* Bracken, 81 Ky., 596, the court say:

"The right to amend the charter may be expressly reserved, "but that right does not confer the power of taking from the "corporators the control of the corporate property."

In the case of Sage *v.* Dillard, 15 B. M., 357, the Court of Appeals say—

"That the power to alter, amend, or even destroy a con- "tract does not invest the State with the power to make a "new contract without the consent of the party to be affected, "or give to the State the power, by revocation or amendment, "to divest vested rights."

The revocation by the State of guaranteed immunity from taxation contained in the act of April 22, 1882, takes from the plaintiff in error the control of its corporate property and applies it to public use; it is the substitution of a new contract for the old one without the consent, and against the wish, of the plaintiff in error, and is not the alteration, amendment, or revocation of the old one, and it is for these reasons the plaintiff in error insist that it was not in the power of the State to repeal the guaranteed immunity. But again this act of April 22, 1882, recites—

"That the Sinking Fund of the City of Louisville, being "the owner of the stock of the Louisville Water Company, and "said Water Company, by virtue thereof, is the property of the "City of Louisville, therefore."

This act discloses that the stock of the Louisville Water Company was, and is, the property of a corporation known as the

Sinking Fund of the City of Louisville, and that by the 10th section of an act of the General Assembly of the Commonwealth Kentucky, approved March 9, 1867, it was enacted:

"The General Council shall have no power to pass ordi-
"nances or resolutions to diminish the present resources of the
"Sinking Fund of said city, as now established, until all the
"debts of said city now or hereafter charged or chargeable upon
"said fund are paid, but may pass laws to increase the said re-
"sources, and the whole resources of said fund, from year to
"year, shall be sacredly set apart and applied to the payment
"of the interest and principal of the city's debt, chargeable on
"said fund, and to no other uses or purpose, until the whole of
"the debts of the city are fully paid and satisfied, including the
"present and any future indebtedness."

In the same section of the act, the Board of Commissioners was created, and it was enacted that they "shall have corporate powers and existence, may sue and be sued, and do and perform all things necessary to execute the duties required and the powers given them by this act. And further, that "The funds, estate and income belonging now or hereafter to said fund shall be, and is vested in, and be under the control and management of said Board of Commissioners, for the purpose herein declared; if injured, withheld or abstracted, said Board of Commissioners may sue for and recover the same, or any part thereof, in their corporate name. The said Commissioners shall apply said fund to the payment of said city's debts, chargeable on the same, when they can do so on fair terms, but whenever there shall be a surplus of said funds which can not be applied on fair terms to the extinguishment of the said liabilities of said city, the said Commissioners may invest the same in bonds of said city, on which it is bound, or bonds of the State of Kentucky, or in such good and solvent stock as shall be approved by a vote of a majority of each Board, elect of the

General Council by yeas and nays." (Kentucky Session Acts, 1867, vol. 2, p. 420.)

In treating of this branch of the subject, the Court of Appeals of Kentucky, in the 86th Ky., City of Louisville *v.* Murphey & Co., page 60, say:

"The object in creating the Sinking Fund or the corporation "known as the Commissioners of the Sinking Fund of the City of "Louisville, was that certain revenues then existing, belonging to "the city, and such as might afterward be acquired for that pur- "pose, should be applied to the payment of the principal and "interest of the public debt of the municipality. The act of "1869 increased the resources of the Sinking Fund, and the act "of March 30, 1880, directed that the General Council should, "for the purpose of paying off the bonds, that is, the principal as "well as the interest, continue to levy and collect every year, this "thirty cent tax, to be paid over by the treasurer of the city to "the Sinking Fund Commissioners. This entire bonded debt "was to be paid out of the funds belonging to the Sinking Fund, "and the evident purpose was to raise the money by taxation, to "meet, not only the interest on the bonds, but to have the money "in the Sinking Fund to pay the bonds as they matured. Nor "were the resources of the Sinking Fund to be applied alone to "this railroad debt, but to the entire debt of the city, and the "fund to be held sacred for that purpose. If the purpose of this "taxation was to pay the interest only, and not the principal of "the bonds, the question presented would be one of more diffi- "culty. But the tax was levied, or directed to be levied, to pay "the entire debt, principal, and interest. The accumulation of the "money is to pay the principal when due as well as the interest, "and this is denominated a Sinking Fund. It is certain that the "bonded debt, and for the payment of which the Sinking Fund is "chargeable, exceeds nine millions of dollars, and near two mill- "ions of these railroad bonds outstanding, and the resources of "the Sinking Fund will not exceed four and one-half millions."

It will thus be seen that the stock in the Louisville Water Com-

pany was the property and the exclusive property and a resource of the Commissioners of the Sinking Fund of the City of Louisville, and that by an act of the General Assembly of that State, March 9th, 1867, the entire resources of the Commissioners of the Sinking Funk had been sacredly set apart to meet the bonded indebtedness of the City of Louisville, which the Court of Appeals ascertained on the 18th day of June, 1887, to then exceed nine million of dollars, and that the resource was just half the amount of the liability. The recital contained the act of April 22nd, 1882, was intended to show the relations existing between the creditors of the City of Louisville, the Commissioners of the Sinking Fund, the City of Louisville, and the Louisville Water Company, and the acts relating to each so far as affected by the act of April 22nd, 1882, must be read in connection with and as a part of the act of 1882 in order to ascertain the purpose in view and the intentions of the parties.

Morawetz in his work on Private Corporations, section 316, says:

"There is no reason why a charter should be construed differ-
"ently from other written instruments. The object should be to
"discover the intention of the parties and it would be absurd to
"attempt to ascertain the intention of the parties by the applica-
"tion of any technical or arbitrary rule."

When the act of April 22d, 1882, was passed and assented to, it became a contract and it cannot be construed otherwise than as a contract between the State of Kentucky, the Louisville Water Company, the City of Louisville, and the Commissioners of the Sinking Fund; it fixed the rights, liabilities and duties to each in reference to the supply, by the plaintiff in error, of water to the public fire cisterns, plugs, and hydrants of the City of Louisville for fire protection, and under no power of revocation contained in section 8, of chapter 68, of the General Statutes, could the State

impair the obligation of the contracts then existing between those corporations. A State can not in any manner alter the mutual relationship of parties to a contract or their duties or liabilities of each to the other as defined by its terms.

Nor can it be successfully maintained that, because the City of Louisville and the Commissioners of the Sinking Fund are civil institutions, that thereby the power of the State over them in respect to the matter under consideration is thereby increased.

In the case of Louisville *v.* The University, etc., 15 Ben Monroe, 675, the Court of Appeals of Kentucky say:

"Then the City of Louisville, though itself a civil institution, "created to be employed to some extent as an instrument of "government, was not, and is not, the government itself, but a "distinct, though subordinate being, and, although as a public "corporation, it holds its existence and its peculiar forms and "faculties at the will of the government, of which it is an in- "strument, or in some sense a part, it is not so identified with "it that all its acts and acquisitions must necessarily be ascribed "to the government, or to its benefit, either in point of interest "or power. Louisville might hold property for herself or her "corporators, she might contract with individuals or other cor- "porations with respect to her peculiar interest, and might cer- "tainly contract with the State, and even if abolished as a cor- "poration the State would not thereby become the beneficial "proprietor of her rights of property or contract."

As the act of the 22d of April, 1882, was not only a contract between the State and the Water Company, but was a contract between the City of Louisville, the Commissioners of the Sinking Fund, and the Louisville Water Company, in reference to a resource of the Sinking Fund, which the faith of the State had pledged should not be reduced, diminished, or impaired, and which by an act of the State was sacredly set apart to meet the liabilities of the City of Louisville in an amount

exceeding nine million of dollars, it is, we take it, clear that the State was not competent to revoke the grant of immunity from taxation contained in the act of April 22, 1882. Van Hoffman *v.* Quincy, 4th Wallace, 535--555; Oldtown, &c., *v.* Veasie, 39 Maine, 571, 580, 581. Morawetz on Private Corporations, sections 1101, 1102, and authorities then cited, and the plaintiff in error therefore submits that the motion to affirm as a delay case should be overruled and denied.

This court decided, in granting the writ of error, that the act of April 22d, 1882, embodied a contract between the Water Company and the State, to the effect that the company should furnish water free of charge to the public fire cisterns and public fire plugs or hydrants of the City of Louisville, and in consideration therefor, should be exempt from the payment of all taxation, State, municipal, and special. The pleadings admit the continued performance by the Water Company of the contract obligations it undertook, by the acceptance of the proposed amendment. This contract, it is not in the power of the State to annul. If the Legislature had, in expressed terms, repealed the act of 1882, the contract would have remained in full force, according to the doctrine of the case of the Navigation Company. The doctrine of that case effectually disposes of the third and fourth sections, which counsel, on page 8 of their brief, attempt to add to the act of 1882, as well as the claim that the amendment of 1882 was accepted with the knowledge of the fact that the Legislature expressly reserved the power to repeal it, and that this reserved power was as much a part of the contract as any other part of it. There was no reserved right to repeal, except such as was provided for by the act of 1856, and the Water Company had notice, from the decision in the case of the Navigation Company, rendered in 1880, that contract rights could not be destroyed, or impaired in virtue of any reservation to be found in the act of 1856.

The violation of the contract by the State, in the enforced taxation of the property of the Water Company, might justify the latter in refusing further to furnish water free of cost to the public cisterns, fire plugs, and hydrants of the City of Louisville. But one party can not, by the violation of a contract, force the other to consent to its termination. The exemption from taxation is indefinite as to time, and so, likewise, is the duty of the Water Company, to supply the City of Louisville with water for protection against fire. Each party has the right to demand that the other shall carry out the contract according to its terms, and neither can annul, or set it aside without the consent of the other.

The Act of 1882 a Contract.

Counsel for defendant in error do not insist that the act of April 22d, 1882, did not constitute a contract between the State of Kentucky and the Water Company. We forbear further to discuss that question, taking it for granted it was considered before the writ of error was awarded. We, however, refer the court to the printed briefs filed in obedience to the order of January 5th, 1891. We respectfully submit, there is no ground for the assumption by counsel for the defendant in error, that the writ was taken out for the purposes of delay, or for their contention, that the question upon which the jurisdiction of this court depends is so frivolous as not to deserve or need full discussion.

Motion to Adnance.

So far as concerns the motion to advance the hearing, we have only to say, that the plaintiff in error does not object to having the cause heard at any time it may suit the convenience of the court to afford counsel an opportunity to be heard orally in the presentation of their client's case, and if such opportunity can be

afforded at the coming October term of this court, the plaintiff in error may be considered as uniting in the request that the hearing be advanced to that term.

We have caused to be printed and annexed to this brief copies of the affidavits of Charles Hermany and Dr. O. Everts, which affidavits will, with the permission of the court, be filed to be read on the hearing of the motion to dismiss.

All of which we most respectfully submit,

T. L. BURNETT AND
WILLIAM LINDSAY,
Counsel for Plaintiff in Error.

H. M. LANE AND
J. C. BURNETT,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

LOUISVILLE WATER COMPANY, . . . *Plaintiff in Error,*

vs.

WM. CLARK, Sheriff, ... *Defendant in Error.*

The affiant, Charles Hermany, on his oath, says that on or about the 7th day of February, 1891, affiant was requested by the President of the Plaintiff in Error to serve the citation issued in the above-styled case on the defendant, Wm. Clark, Sheriff of Jefferson County, Kentucky, and that in accordance with said request, affiant sought and found the said Wm. Clark, Sheriff of Jefferson County, in a private sanitarium, known as "Cincinnati Sanitarium," located at College Hill, about eight or nine miles from the city of Cincinnati, in the State of Ohio, and in charge of Dr. O. Everts, as its keeper, or Superintendent.

Affiant says that upon reaching the said sanitarium he had an interview with the Superintendent of said sanitarium, and clearly and distinctly informed the said Dr. O. Everts, keeper of same, that the object of his visit was to deliver to Wm. Clark, Sheriff of Jefferson County, Kentucky, in person, a notice or citation on official business, and fully acquainted his said keeper with the object of affiant's visit, and thereupon affiant was conducted into another room, and Wm. Clark, whom affiant well knew, was brought into the room, and at once recognized affiant, and affiant then and there delivered to said Wm. Clark, Sheriff of Jefferson County, a copy of the citation in this case. Said Clark at once wrote the date of the service on the back of the copy of the citation, and affiant withdrew and made the return endorsed, and sworn to on the original citation filed.

[Signed] CHAS. HERMANY.

Subscribed and sworn to before me, a Notary Public in and for Jefferson County, Kentucky, by Charles Hermany, to me personally known, this 8th day of April, 1891.

[Signed] H. D. DOUGHERTY,

Notary Public in and for Jefferson County, Ky.

STATE OF OHIO, } Sct.
HAMILTON COUNTY, }

The affiant, Dr. O. Everts, on oath, says that he is, and has been for eleven years last past, the Superintendent in charge of Cincinnati Sanitarium, situated at College Hill, about eight or nine miles from the city of Cincinnati, Ohio. That on the eighth day of May, in the year of 1890, William Clark, Sheriff of Jefferson County, Kentucky, came to said Cincinnati Sanitarium, of which affiant was Superintendent, for treatment; and affiant says that he, said William Clark, Sheriff of Jefferson County, Kentucky, to his, affiant's personal knowledge, remained in said sanitarium under treatment as aforesaid, continuously since that date, and that on the 6th day of January, 1891, and before that date, and since that date, the said Clark has been continuously within the said institution, and has not been away therefrom, and that the said Clark has not been in the State of Kentucky since the eighth day of May, 1890.

[Signed] ORPHEUS EVERTS.

Subscribed and sworn to before me, a Notary Public in and for the county of Hamilton, State of Ohio, by Dr. O. Everts, to me personally known, on this 14th day of April, 1891.

[Signed] H. B. TURRILL,
Notary Public in and for Hamilton County, Ohio.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1891.

THE LOUISVILLE WATER CO., - - - Plaintiff in Error,

VS. [No. 615.

WM. CLARK, Sheriff of Jefferson Co., Ky., - - Defendant,

In Error to the Court of Appeals of the State of Kentucky.

BRIEF OF PLAINTIFF IN ERROR.

T. L. BURNETT,
WM. LINDSAY,
Counsel for Plaintiff in Error.

H. M. LANE,
J. C. BURNETT,
Of Counsel.

The Bradley & Gilbert Co., Print., Louisville, Ky.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE LOUISVILLE WATER CO., . . PLAINTIFF IN ERROR.

VS. [No. 615.

WM. CLARK, *Sheriff of Jefferson Co., Ky.*, . . DEFENDANT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF OF PLAINTIFF IN ERROR.

It is claimed by the plaintiff in error that its charter constitutes a contract between it and the Commonwealth of Kentucky, and that the obligation of such contract has been impaired by subsequent legislation of that State, or an authority exercised thereunder; that, in violation of its contract rights, the assessor of the county of Jefferson and State of Kentucky, and the clerk of the County Court of said county, and the sheriff of the said county, by an authority exercised under said State, assessed for taxes and threatened to seize and sell the property of the plaintiff in error for State taxes for the year 1887. The plaintiff in error obtained an injunction against the said sheriff, restraining him from a seizure or sale of the property of the plaintiff in error for taxes, and said injunction was made perpetual. The Court of Appeals reversed the judgment of the court below, dissolved the injunction, and decided that there was no consideration to uphold the contract of exemption from taxation, and that the contract was null and void. The errors assigned are as follows:

First—That the said court erred in adjudging that the act of the General Assembly of Kentucky, approved April 22, 1882, entitled "An act to amend the charter of the Louisville Water Company," after being accepted and its conditions approved by the plaintiff in error, does not constitute a legal, valid, and enforceable contract between the Commonwealth of Kentucky and the said plaintiff.

Second—That the said court erred in adjudging that the said contract is not supported by a legal and valuable consideration upon the part of the said plaintiff in error.

Third—The said court erred in adjudging that the authority exercised under and in the name and for the benefit of the Commonwealth of Kentucky in the assessment of the property of the plaintiff in error for taxation, and in attempting to enforce the collection of such taxes, does not impair the obligation of the contract involved in the acceptance by the plaintiff in error of the provisions of said act, approved April 22, 1882.

Fourth—The said Court of Appeals erred in reversing the Louisville Law and Equity Court and in remanding the cause to that court, with instruction to require the plaintiff in error to pay the alleged taxes into court, or failing to do so within a reasonable time, the management of the business of the plaintiff in error to be entrusted to a receiver until enough money is realized to pay said taxes and the cost of the litigation.

Fifth—The said court erred in not affirming the judgment of the Louisville Law and Equity Court. The Court of Appeals of that State was required by law to take judicial notice of all acts and resolutions of the General Assembly. (See chapter 37, section 1, page 544, General Statutes of Kentucky, edition 1888).

The acts of the General Assembly of the Commonwealth of Kentucky, bearing upon the questions arising upon this record, and of which the Court of Appeals of that State took judicial notice, are as follows:

The charter of the Louisville Water Company, enacted by the

General Assembly of the Commonwealth of Kentucky, and approved March 6, 1854. (See Session Acts, 1854, vol. 2, page 121.)

Among other grants and provisions contained in said charter it is provided as follows:

"SEC. 5. The corporation is hereby authorized and empowered to take water from the Ohio River or any other stream or place, and may lay its pipes and aqueducts under or over any railroad, canal, highway, street, or wharf; but the same shall be done in such a manner as not to obstruct and impede the passage thereon. In laying its pipes or aqueducts across or through any highway or street, and in repairing such pipes and aqueducts from time to time, said corporation shall not unnecessarily obstruct such highway or street; and in every case of a removal of any earth or pavement in any such highway or street, the said corporation shall cause the earth to be replaced, and the pavement to be laid new, so that such highway or street shall be in as good condition as the same was before such removal.

"SEC. 6. In the laying and construction of the pipes and aqueducts in the city of Louisville, the same shall be so laid and constructed that an abundant supply of water can be drawn therefrom for the extinguishment of fires; and said corporation shall furnish water to the city of Louisville, for the extinguishment of fires and cleaning of streets, upon such terms as may be agreed between it and the authorities of said city; and it shall have the exclusive right to furnish water to the inhabitants of said city, by means of pipes and aqueducts, if the authorities of said city shall agree thereto, and upon such terms and for such time as may be agreed.

"SEC. 7. The said corporation is hereby empowered to sell the privilege of using the water which may be conducted through its pipes or aqueducts to any corporation or person; and the said corporation may make all reasonable rules and regulations as to the manner and time in which said water may be taken and used."

It is provided in section 10 that the price of water furnished by the said company to the city of Louisville shall not exceed the average price charged in Pittsburgh, Cincinnati, and St. Louis.

An act to amend the charter of the Louisville Water Company, approved February 28, 1867, provides in the third section:

"That the city of Louisville, in its corporate capacity, shall have and is hereby invested with the right and power to take and subscribe for

the said stock, or any part thereof, by ordinance or resolution of the General Council, and to pay for the stock on such terms as the Directors of the said company and the city may agree. The said city shall have authority, and power is hereby granted, by ordinance or resolution of the General Council, to issue and sell the bonds of said city, payable in not less than twenty nor more than thirty years from their date, in denominations of $1,000 each, with coupons attached thereto, payable semi-annually, bearing interest of not less than six nor more than seven and three-tenths per cent. per annum, which bonds, when so issued, may be paid and delivered to said Louisville Water Company in payment of any stock thus subscribed by said city." (See Session Acts of 1867, vol. 2, page 167.)

By the charter of the city of Louisville, approved the 3d day of March, 1870, in section 101 it is provided:

"The General Council shall provide by ordinance for the establishment and a maintenance of a Fire Department, with such force and with such organization thereof, and such apparatus, engines, and all things necessary for efficient service, and such buildings for the use of said department as the General Council may deem sufficient to provide against fires," &c. (See Session Acts of 1870, vol. 2, page 61.)

It is alleged in the petition, and not denied, that the plaintiff in error "has at all times kept the public fire cisterns and public fire plugs or hydrants of said city abundantly supplied with water, and that prior to the 22d day of April, 1882, it was given the right to and did exact and receive from the city of Louisville payment for all water furnished and supplied by it to the said public fire cisterns and public fire plugs or hydrants in the said city of Louisville, and which water so furnished and supplied by this plaintiff to the said public fire cisterns and public fire plugs or hydrants of the city of Louisville has been, since the year 1870, and now is used only and solely as a protection against loss or destruction by fire of the property of the Commonwealth and its citizens so far as situated in the city of Louisville, and that at all times since the first day of January, 1880, it has and does now cost the plaintiff, annually, at least $10,000 to furnish with water, and keep supplied with water, the public fire cis-

terns and public fire plugs or hydrants in the city of Louisville." (See page 4 of printed record.)

By the 10th section of the act approved March 9th, 1867, entitled "An act to establish the boundaries and taxable limits and to amend the charter of the city of Louisville," it is provided:

"The General Council shall have no power to pass ordinances or resolutions to diminish the present resources of the Sinking Fund of said city as now established, until the debts of said city, now or hereafter charged or chargeable upon said fund, are paid; but may pass laws to increase said resources; and the whole resources of said fund, from year to year, shall be sacredly set apart to the payment of the principal and interest of the city's debt chargeable upon the said fund, and to no other use or purpose, until the whole of the debts of the city are fully paid and satisfied, including the present and any future indebtedness of said city. The Mayor, the President of the Board of Aldermen for the time being, and three persons to be chosen by the General Council on joint ballot, as hereinafter directed, and their successors in office, shall constitute the Commissioners of the Sinking Fund of the city of Louisville, and by that name shall have corporate powers and existence, may sue and be sued, and do and perform all things necessary to execute the duties required and powers given them by this act. The funds, estate, and income belonging now or hereafter to said fund shall be and is vested in and be under the control and management of said Board of Commissioners for the purposes herein declared; if injured, withheld, or abstracted, said Board of Commissioners may sue for and recover the same or any part thereof in their corporate name. The said Commissioners shall apply said fund to the payment of the city's debts chargeable on the same when they can do so on fair terms; but whenever there shall be a surplus of funds which can not be applied on fair terms to the extinguishment of said liabilities of said city, the said Commissioners may invest the same in bonds of said city, or for which it is bound, or bonds of the State of Kentucky, or in such good and solvent stocks as may be approved on the vote of a majority of each Board elect of the General Council, by yeas and nays." (See Session Acts of 1867, vol. 2, page 420.)

By an act entitled "An act to increase the resources of the Sinking Fund of the city of Louisville," approved March 15th, 1869, it is provided in the first section as follows:

"There shall be added to the present resources of the Sinking Fund of said city the stock owned by her in the Louisville Water Company, also an annual tax of forty cents on each one hundred dollars worth of such real and personal property as may be taxed for city purposes in said city, to be levied and collected in cash as herein provided."

And in section 4 of said act:

"The Sinking Fund shall be under the control and management of the Commissioners of the Sinking Fund, and shall be held and sacredly used for the payment of the principal and interest of said bonded debt. The resources of the Sinking Fund shall not be diminished, but may be increased by the General Council; nor shall any other bonds, nor the interest thereof, be charged upon said fund, unless provisions are made for the payment thereof at the time of the charge sufficient in the opinion of the Commissioners to pay the same." (See Session Acts of 1869, vol. 2, page 420.)

And in section 9 of an act approved March 3d, 1871, entitled "An act to amend an act establishing a new charter of the city of Louisville," it is provided:

"The Commissioners of the Sinking Fund of said city shall have the power to purchase from the city of Louisville, or individuals holding the same, the certificates of stock held by said city or said individuals in the Louisville Water Company, and when so purchased shall be held by the said Commissioners as a part of the Sinking Fund of said city." (See Session Acts of 1869, vol. 2, page 420.)

The Sinking Fund, with all its resources and incomes thus placed under the exclusive control of the Board of Commissioners, and sacredly set apart to the payment of the debts of the city of Louisville, then existing or thereafter created, is essentially a trust fund, and absolutely free from the control of the municipal government of the city of Louisville.

In 1882 the capital stock of the Water Company and all profits, rents, and earnings accruing therefrom, constituted part of this trust fund, and, under the law, no portion of such profits could be applied to the reduction of the general expenditures of the city of Louisville. One of these expenditures was the sum of money

paid by the city each year to the Water Company for water furnished to the public fire cisterns, fire plugs, and hydrants. To relieve the city from these annual payments was to reduce the receipts of the Water Company to that extent, and to the same extent to reduce the resources or incomes of the Sinking Fund. This the city clearly could not do of its own motion, as its General Council was expressly prohibited from passing ordinances or resolutions to diminish such resources.

Nor could the State, through its legislative department, arbitrarily release the city from the performance of its contract duty to pay the Water Company for the water furnished for protection against fire.

In the preservation and due administration of the Sinking Fund, its resources and incomes, the creditors of the city of Louisville have a direct and immediate interest. While, strictly speaking, they may not have a lien upon that fund, it is a security held permanently for their benefit, and its destruction or impairment by legislative enactment would be to impair the obligations of the contract on the part of the city with its creditors, that this fund should be raised, preserved, and protected, and sacredly held and applied to the payment of the city's debts. By this contract the State of Kentucky is bound. Any enactment by its General Assembly, the tendency of which would be to divert the resources of the city's Sinking Fund to other purposes than the payment of the city's debts, would be void, because repugnant to the Constitution of the United States.

In the case of Van Hoffman *v.* Quincy, the creditor's demand was secured by statutory provision for the collection of an annual tax. The State Legislature repealed the statute. This court held the repealing statute void.

Speaking of the power conferred by the repealing statute, this court said:

"It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the

extent necessary to meet its engagements, the power thus given can not be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor can not annul, and which the donee is bound to execute, and neither the State nor the corporation can any more impair the obligation of the contract in this way than any other." (4 Wallace, 535, 555.)

If the power to tax in such a case is a trust that must be executed, a fund sacredly set apart to secure the payment of a debt in a similar case must be a trust fund beyond the arbitrary control of a State Legislature.

The act of April 22d, 1882, in so far as it required the Water Company to furnish water to the city of Louisville free of cost, reduced the resources of the Sinking Fund and impaired the obligation of the city's contracts with its creditors, unless adequate compensation was made to the Water Company for this reduction of its revenues in some way. And this, we respectfully submit, was the understanding of the Kentucky General Assembly when it came to enact the amendment of 1882. It did not intend to impair the obligation of any contract, nor to reduce the resources of the Sinking Fund of the city of Louisville. It proposed, by the first section of the act of 1882, to relieve the city of an onerous annual burden. In doing this, it reduced the annnal receipts of the Water Company. To meet this latter result, and to pay due regard to the rights of the Sinking Fund Commissioners to the benefit and control of all the receipts of the Water Company, it proposed to exempt the property of that company from all taxation, State, municipal, and special. This proposition the Water Company, with the consent of its single stockholder, the Board of Commissioners of the Sinking Fund, accepted, and by that acceptance the contract for which we contend was consummated. It was certainly optional with the Water Company whether it would accept the provisions of the act of 1882, and if no adequate compensation had been made for the loss of its receipts, which would necessarily follow obedience to the provisions of the

first section of the act, it would have been the clear duty of the Board of the Sinking Fund Commissioners to intervene to prevent the diminution of the income of one of the resources of the Sinking Fund. If we are right in the conclusion that the Water Company and Sinking Fund Commissioners could not have been compelled to carry out the provisions of the first section of the act of 1882, then it must follow that the entire act, with all it provisions, those in favor of the Water Company as well as those to its detriment, must be upheld as constituting a valid contract, the obligations of which the State of Kentucky can not violate or disregard through its tax-gathering officers, its courts, or otherwise.

In the case of the City of Louisville *v.* Murphy, 86 Ky., page 60, the Court of Appeals of Kentucky had occasion to pass upon the legal relations of the city of Louisville and the Board of Commissioners of the Sinking Fund, and in that opinion say:

"'The object in creating the Sinking Fund, or the corporation known as the Commissioners of the Sinking Fund of the city of Louisville, was that certain revenues then existing and belonging to the city, and such as might afterwards be acquired for that purpose, shall be applied to the payment of the principal and interest of the public debt of the municipality. The act of 1869 increased the resources of the Sinking Fund, and the act of March 30th, 1880, directed that the General Council should, for the purpose of paying off these bonds, that is, the principal as well as the interest, continue to levy and collect every year this thirty cents tax, to be paid over by the Treasurer of the city to the Sinking Fund Commissioners. This entire bonded debt was to be paid out of the funds belonging to the Sinking Fund, and the evident purpose was to raise the money by taxation to pay, not only the interest on the bonds, but to have money in the Sinking Fund to pay bonds as they matured. Nor were the resources of the Sinking Fund to be applied alone to this railroad debt, but to the entire debts of the city, and the fund to be held sacred for that purpose. If the purpose of this tax was to pay the interest only, and not the principal of the bonds, the question presented would be one of more difficulty. But the tax was levied or directed to be levied to pay the entire debt, principal and interest. The accumulation of the money is to pay the principal when due, as well as the interest, and this is denominated as the Sinking Fund. It is certain that the bonded debt, and for the payment of which the Sinking Fund is charge-

able, exceeds nine millions of dollars, and near two millions of these railroad bonds outstanding, and the resources of the Sinking Fund will not exceed four and one-half millions; and while the resources of the Sinking Fund may be sufficient to pay this principal bonded indebtedness as it matures for the next few years, there are other liabilities existing to which its resources may be applied, and that there is a surplus ready to pay a portion of the interest as it becomes due is no reason why the collection of the taxes may be restrained or a restraining order go because this tax is not needed for the year 1887, for this would exclude the power of the Legislature or the Council, under its authority, to provide means under this taxing power conferred to meet the principal as well as the interest due upon the bonds."

An act to amend the charter of the Louisville Water Company, approved April 22d, 1882, is as follows:

"SEC. 1. It shall shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of charge.

"SEC. 2. The Sinking Fund of the city of Louisville being the owner of the stock of the Louisville Water Company and said Water Company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of all kinds, of whatever character, State, municipal, or special. This act shall take effect from and after its passage." (See Session Acts of 1882, vol. 1 page 915.)

It is alleged, and not denied, that this amendment to the charter of the plaintiff in error was accepted and became a part and parcel of the charter of the Louisville Water Company on the 22d day of April, 1882; that prior to that date the Louisville Water Company had furnished an abundant supply of water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection, and that the city of Louisville had by contract paid for such services; that on the 22d day of April, 1882, the said amendment was duly accepted, and from that date on to the filing of the petition in this record, the plaintiff in error had furnished an abundant supply of water to the public fire cisterns and public fire plugs or hydrants in the city of Louisville free of charge; that the plaintiff in error accepted the said amend-

ment as a contract, and has faithfully kept and performed the same, and alleges in its petition filed in this record :

"That the said act of the General Assembly of the Commonwealth of Kentucky, approved the 22d day of April, A. D. 1882, and entitled, 'An act to amend the charter of the Louisville Water Company,' and acceptance of and consent to the same by this plaintiff, as a part of its charter, constitute and constitutes a contract by and between the Commonwealth of Kentucky and this plaintiff, and that the exemption and immunity from taxation secured and given by the said act, in consideration of the undertaking to and the supplying by this plaintiff, free of charge, the public fire cisterns and public fire plugs or hydrants in the city of Louisville with water as a protection against loss and destruction by fire of the property of the Commonwealth and its citizens so far as located in the city of Louisville, is a vested right, rests in a contract as aforesaid, and is sustained, supported, and protected by the Constitution of the United States." (See pages 4 and 5 of the printed record.)

WHETHER THE ACT TO AMEND THE CHARTER OF THE LOUISVILLE WATER COMPANY, APPROVED THE TWENTY-SECOND OF APRIL, 1882, CONSTITUTED A CONTRACT BETWEEN THE PLAINTIFF IN ERROR AND THE STATE OF KENTUCKY IS THE FIRST QUESTION TO BE CONSIDERED.

This statute, consisting of two sections, should be read as a whole, and construed in the light of all the previous legislation by that State on the subject:

1. The charter of the Louisville Water Company.

2. The charter of the city of Louisville.

3. The charter of the Commissioners of the Sinking Fund of the city of Louisville.

4. The act of the General Assembly of March 15th, 1869, by which the stock in the Louisville Water Company, owned by the city of Louisville, was added to the resources of the Sinking Fund.

5. That by law all the resources of said Sinking Fund were to be held and sacredly used for the payment of the principal and interest of the bonded indebtedness of the city of Louisville, including the present and any future indebtedness of said city.

6. That the Louisville Water Company had, prior to April 22d, 1882, furnished the public fire cisterns and public fire plugs or hydrants with water for fire protection, and that the city of Louisville had paid for such water.

7. That the said act of April 22d, 1882, was accepted by the Louisville Water Company, and from that date to the present time the said Water Company has furnished to the public fire cisterns and public fire plugs or hydrants an abundant supply of water for fire protection free of charge.

8. That the water thus furnished for fire protection to the city of Louisville costs the Louisville Water Company $10,000 annually.

Rules of Construction.

It is an ancient and well settled rule, that where any cause of doubt arises, although apparently the doubt attaches only to a particular clause, the whole statute is to be taken together, and to be examined, to arrive at the legislative intent. "The best exposition of all letters patent," said Lord Coke, "and acts of Parliament are the letters patent and acts of Parliament themselves, by construction and comparing all the parts of them together."

In Pennsylvania it was held that in construing any part of a law, the whole must be considered, the different parts reflect light on each other, and, if possible, such a construction is to be made as will avoid any contradiction or inconsistency. (Commonwealth *v.* Duane, 1 Binn., 601.) And in Massachusetts it has been said that in putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to every part of it. Commonwealth *v.* Alger, 7 Cushing, 53–89. And so in Michigan. "In the construction of a statute, effect is to be given to every clause and section of it, and it is the duty of the court, as far as practicable, so to reconcile the different provisions as to make the whole act consistent and harmonious." (2 Michigan, 138.)

And in Kentucky, in Nazareth *v.* Commonwealth, 14 Ben M., 268, the Court of Appeals say that such a construction will be given to all parts of the act as "that the Legislature may not appear to have done a vain and illusive thing."

And in Bailey *v.* the Commonwealth, 11 Bush, 688, the Court of Appeals of that State say: "A law ought to be interpreted in such a manner as that it may have effect, and not be found vain and illusive." And the Supreme Court of the United States, in Pennington *v.* Coxe, 2 Cranch, 53, said: "A law is the best exposition of itself, that every part of an act is to be taken into view for the purpose of discovering the mind of the Legislature."

In Washington *v.* Hoffman, 101 U. S., 112, the court say:

"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said, 'that a statute ought upon the whole to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is, 'that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.'"

The court will look not only to the language employed, but to the subject matter and surrounding circumstances. (Berrida *v.* Silsby, 21 Howard, 161; Nash *v.* Towne, 5 Wall, 94.) "And passing from the external history of the statute to its contents, it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself." (Endlich on the Interpretation of Statutes, section 35.)

Guided by these rules, in the full light of the external history of the statute, the act of April 22d, 1882, by the acceptance of the Louisville Water Company, became a contract as clearly as that the parties were competent to contract.

It will not be argued before this court that it was within the legislative power to require the Louisville Water Company, a pri-

vate corporation, to furnish water for fire protection to the city of Louisville free of charge. The same power had, by laws previously passed, authorized the parties to contract, one to furnish an abundant supply of water for that purpose and the other to pay for it. It would not have been more flagrantly unreasonable or unlawful if in lieu of section 1 of the said act it had provided that the Louisville Water Company should pay all the taxes levied by the State on all the property in the city of Louisville and Jefferson County, or that the property of the Louisville Water Company should after that date be the property of the city of Louisville or other corporation or person. To give such a construction would at once declare the first section a nullity and violate the well established rules of construction.

If we follow the rules of construction, and take the whole statute together, it will be seen at once that the legislative power of the State made an offer of exemption from taxation, and the reason for such exemption was in consideration of the performance of the services therein named, which offer was accepted and the duties performed, and whether these duties performed, and to be performed, are public services sufficient to support an exemption from taxation is the next question.

THE OBJECT TO BE ATTAINED WAS A PUBLIC ONE, FOR WHICH THE STATE COULD MAKE SUCH PROVISIONS BY LEGISLATIVE ENACTMENT AS IN THE JUDGMENT OF THE LEGISLATIVE DEPARTMENT WOULD BEST PROMOTE THE PUBLIC HEALTH AND THE PUBLIC COMFORT, OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY.

That the legislature had the power to make the contract of exemption from taxation, see opinion of Chief Justice Taney, 16 Howard, 428; Ohio Life Insurance Company *v.* Debolt.

The Supreme Court of the United States, in the case of New Orleans Water Works Company *v.* Rivers, 115 U. S., 527, opinion by Mr. Justice Harlan, said:

"This case is therefore controlled by the decisions just rendered in the New Orleans Gaslight Company *v.* the Louisiana Light and Heat Producing Manufacturing Company. (115 U. S., 516.) The two are not to be distinguished upon principle; for if it was competent for the State before the adoption of her present constitution, as we have held it was, to provide for supplying the city of New Orleans and its people with illumination gas by means of pipes, mains, and conduits placed, at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for a like use in the same city. The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the State, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interests. And as the object to be attained was a public one, for which the State could make provisions by legislative enactment, the grant of the franchise could be accompanied by such exclusive privilege to the grantee in respect to the subject of the grant as in the judgment of the legislative department would best promote the public health and the public comfort or the protection of public and private property. Such was the nature of the plaintiff's grant, which not being at the time prohibited by the Constitution of the State, was a contract, the obligation of which cannot be impaired by subsequent legislation or by a change in her organic law. It is as much a contract within the meaning of the Constitution of the United States as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it for the exclusive right to contract and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point."

The doctrine of this opinion was expressly followed and approved by the Kentucky Court of Appeals in City of Newport *v.* Light Company, 84 Ky., page 166. See also Louisville Water Company *v.* Hamilton, 81 Ky., 523; New Orleans Gaslight Company *v.* The Louisiana Light and Heat Producing Manufacturing Company, 115 U. S., 650; Louisville Gas Company *v.* Citizens Gas Light Company, 115 U. S., 683; Gordon *v.* Winchester, 12 Bush, 114; Mobile *v.* Kimball, 102 U. S., 239; State *v.* Morris, 46 N. J. L., 499; New Orleans *v.* Clark, 95 U. S., 652; Beekman *v.* Saratoga, 3 Paige, 73; Richie *v.* Bar

Harbor, 75 Maine, 91; Indianapolis *v.* Burkhardt, 41 Ind., 369; Kam *v.* Baltimore, 15 Md., 240; Portland *v.* Portland, 67 Maine, 135; *In re* Water Commissioners, 31 H. J. L., 74; Spring Valley *v.* San Francisco, 52 Cal., 121; Dingley *v.* Boston, 100 Mass., 560; Cooley on Constitutional Limitations, 532, 533, 537; Burrough on Taxation, 22; Cooley on Taxation, 98, 99.

The contract is thus clearly ascertained, but the obligation of the contract was impaired by the Revenue Act of May 17, 1886.

Obligation of the Contract Impaired.

The Court of Appeals of Kentucky was bound to take notice of the Kentucky Revenue Act of May 17, 1886, (Kentucky General Statute, edition 1888; chapter 92; title, "Revenue and Taxation," page 1034.) The provisions of that act claimed to be in conflict with the amendment of the charter of the Louisville Water Company, constituting the contract of April 22, 1882, are:

First—Article 1, section 1, page 1034, in words and figures as follows:

"Rate of Taxation.

"That an annual tax of forty-seven cents upon each one hundred dollars worth of value of all real and personal estate, directed to be assessed for taxation, due and payable the fiscal year assessed, shall be paid by the owner or persons assessed. The aggregate amount of taxes realized by all assessments shall be distributed as follows: Twenty cents for the ordinary expenses of the Government; five cents for the use of the Sinking Fund, and twenty-two cents for the support of common schools."

Second—Section 3, page 1035:

"All property, real and personal, within this State, not herein expressly exempt by law, shall be assessed, as nearly as practicable, according to a uniform rate, in the manner hereinafter provided."

Second—Section 4, page 1035:

"Real estate for the purpose of taxation shall include all lands within this State, and, in assessing said lands, the assessor shall take into consideration its increased value on account of all the improvements thereon."

Third—Section 9, page 1036:

"The following property shall be exempt from taxation:

"1. Property of the United States and the securities thereof, which are, by act of Congress, exempt from taxation.

"2. Property of the Commonwealth.

"3. Cattle of the value of fifty dollars; all crops that are raised in the year in which the assessment is made; articles manufactured in the family for family use; all poultry raised for family use, and the provisions on hand for family use.

"4. Property owned in its entirety by counties, cities, and towns, which is necessary to carry on the government of such county, city, or town.

"5. Public schools, churches, and all property of seminaries, asylums, hospitals, infirmaries, and colleges, and all other funds devoted to charitable purposes, and church parsonages, public cemeteries, except those owned by joint stock companies or associations which declare a dividend; provided, that nothing herein shall be construed as exempting any property which is used or employed for gain of any person, nor any property of which the products, rents, or uses are not devoted solely to the objects of the institution, as contra-distinguished from personal gain of the individuals connected with the institution; provided, nothing herein shall be construed or held to include any house, lot, land, fund, or other property in any insurance or assurance company. Libraries, paintings, and statuary owned by counties, cities, and towns are likewise exempt from taxation.

"6. All property which is maintained by general State taxation."

Section 3, article 4, page 1045:

"It shall be the duty of the president, treasurer, or secretary of any gas or water company, or association in this State, to report, under oath, to the assessor, on or before the fifteenth day of September in each year, as of that date, a full and complete statement of all property, real, personal, or mixed, including buildings, engines, machinery, pipes above and below ground, reservoirs, retorts, tanks, meters, lamp-posts, together with any and all species of property connected with, or in any way belonging to or under the control of such gas or water company, and any surplus or accumulated or contingent fund on hand, cash on hand, stocks, bonds, or other securities, and the total cash value thereof.

Article 12, section 5:

"Chapter 92 of the General Statutes; the act of March 28, 1872, entitled, 'An act to amend chapter 83 of the Revised Statutes, titled Revenue and Taxation;' the amendment to said act of March 28, 1872, entitled, 'An act to amend an act, approved March 28, 1872, authorizing sheriffs to sell real estate to pay revenue tax, approved April 19, 1873; the act approved April 2, 1878, title, 'An act to amend section 6, article 6, chapter 92, General Statutes;' 'An act to amend article 2 of chapter 92 of the General Statutes, title Revenue and Taxation,' approved May 8, 1884, and all other acts, general and special, and parts of acts inconsistent herewith, or not in conformity herewith, are hereby repealed; but nothing in this act shall interfere with any existing local option, or any special or prohibition law, in any county, nor with any local or general law for creating or collecting county levy, or with chapter 1315 of the Acts of 1879–80, or with an act entitled 'An act for the benefit of the Branch Penitentiary at Eddyville,' approved April 7, 1886."

If it be possible to conceive that effect was not given to the revenue law of May 17th, 1886, then we respectfully submit that the plaintiff in error is deprived of its right, under the contract, by the exercise of an authority under the State of Kentucky. (See Martin *v.* Barbour, opinon by Mr. Justice Blachford, May 25, 1891, 140 U. S., page 550.

The Court of Appeals of Kentucky must have given effect to the revenue law of that State, *supra*, for without that there was no pretense of authority to tax the property. (See Louisville & Nashville Railroad *v.* Palms, 109 U. S., page 926, opinion by Mr. Justice Matthew; and Vicksburg, etc., R. R. *v.* Dennis, 116 U. S., page 770, opinion by Mr. Justice Gray.)

Upon these facts the plaintiff in error contends: First. That the act of the 22d of April, 1882, accepted by it, constituted a contract. Second. That the obligation of that contract is impaired by the revenue law approved the 17th of May, 1886, or by an authority exercised under that State.

The Act of 1856 conferred no Power to Repeal the Contract.

It has been contended by counsel for the defendant in error that the Legislature of that State possessed the power to adopt

the statute repealing the act of exemption, and rely upon the Statute of 1856, now the 8th section of chapter 68, of the General Statutes of Kentucky, page 861:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed. Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

A charter or grant to a corporation may not only confer privileges and franchises, but may also involve a contract between the State and the corporation wholly different from the character of contract considered by this court in the Dartmouth College case. The contract growing out of the acceptance of a charter and the organization thereunder is one thing; a contract touching some collateral subject in which the State has an interest, and the terms and conditions of which the State may set out in the act incorporating the proposed corporation, is an entirely different thing.

By the act of 1856, now section 8, chapter 68, of the General Statutes, the State reserved the right to amend or annul the charters of corporations, so far as they relate to corporate privileges and franchises. But no right was reserved to annul or change a contract between the State and the corporation relating to matter in which the State has an interest collateral to, and wholly disconnected from, the grant of the corporate franchises and privileges.

In 1868 the General Assembly of Kentucky incorporated the Green and Barren River Navigation Company, and conferred upon it such corporate powers and privileges as were deemed necessary to enable it to carry out the the purposes of its creation. By a provision of the act of incorporation the State leased to the corporation for the period of thirty years the Green and Barren River line of navigation. After the organization of the corporation it complied with the condition of the proposed contract of lease, and

took and held possession of the improvements for a number of years. In 1880 the Legislature passed an act to repeal, in part, the act incorporating the company. The repeal applied to so much of the act as leased and conveyed to the Navigation Company the Green and Barren River line of navigation, and the benefits of tolls and revenues arising therefrom. The repealing act also provided that the company should surrender the line of navigation to the Commissioners of the Sinking Fund. A refusal to surrender was followed by an action to recover the possession. An appeal brought the controversy into the Court of Appeals. The right to enact the repealing statute of 1880 was claimed under the powers reserved by the act of 1856. The existence of such power was denied by the Court of Appeals. (The opinion of the court will be found in 79 Ky. Rep., commencing page 75.)

After disposing of several questions much pressed in the argument, the court said:

"The act of incorporation embodied in the terms of a contract, whereby, upon certain valuable considerations, the State leased its property to the Navigation Company. That up to 1880 the latter had complied with every stipulation required to be performed on its part. And, without any further reason than the alleged power of the Legislature to disregard such contracts at its will and pleasure, the company is called on to surrender its control over these improvements, and the benefits arising therefrom, without any compensation whatever."

And then the court declared that:

"The repeal of this part of the company's charter can not be held to have divested it of any of its rights or impair the validity of the contract under which these rights are asserted." (Page 81.)

The right of the State to assume the control of the line of navigation by the exercise of the power of eminent domain and the payment of fair compensation was fully recognized, but the court added: "We can not consent to a doctrine that will allow the State to alter or abolish such contracts whenever in the opinion of the Legislature the necessities of the public and the interests of

the State require it." In its conclusion, on page 83, the court used this language:

"The only question is, had the Legislature the power to annul the contract? We think not, and must adjudge that the act of the 8th of April, 1880, is unconstitutional and void. The charter of the appellee has not been repealed, but only so much of it as relates to the lease, and if there had been a repeal of the charter by reason of the statute of 1856, the provision of the first section of that act, 'that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested,' would secure to the appellee its rights under the lease. The right of the appellee to the tolls and benefits of this line of navigation originated from the contract made with the State, and any legislation impairing its obligation, without the consent of the appellee, is a violation of the Constitution."

It is conceded that the first section of the act of April 22d, 1882, has never been changed, modified, or repealed, and that under the operations of the section there is annually appropriated to public use the property of the Louisville Water Company to an amount exceeding $10,000.00. (See page 4, printed record.) If we turn to section 14 of article 13 of the Constitution of Kentucky, we find it ordained that "no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." We submit that the only consideration the Louisville Water Company can receive, or has a right to receive, for the services required by the first section of the act in question, is the guaranteed exemption from taxation, and but for the guaranteed immunity contained in section 2 of the act in question, or some other valuable consideration for the services required by the first section, the attempt on the part of the State to appropriate to public use the service required in the act would be a plain, palpable violation of the Constitution of Kentucky. The stock of the Louisville Water Company was the private, corporate property of that city prior to the act of March 15, 1869 (but not after that date); was not public, municipal, or governmental property; the Louisville Water Com-

pany was and is a purely private corporation. The city of Louisville is not only a body politic, but is also a body corporate, and is so declared in its act of incorporation, and all of its rights and properties as a body corporate are just as fully protected against legislative invasion, or spoliation, as those of a natural person.

In the case of Louisville *v.* the University, 15 B. M., 675, the Kentucky Court of Appeals said:

"Then the city of Louisville, though itself a civil institution, created to be employed, to some extent, as an instrument of government, was not, and is not, the government itself, but a distinct, though subordinate being; and although, as a public corporation, it holds its existence and its peculiar forms and faculties at the will of the government, of which it is an instrument, or in some sense a part, it is not so identified with it that all of its acts and acquisitions must necessarily be ascribed to the government or to its benefit, either in point of interest or power. Louisville might hold property for herself or her corporators; she might contract with individuals or other corporations with respect to her peculiar interest, and might certainly contract with the State, and even if abolished as a corporation, the State would not thereby become the beneficial proprietor of her rights of property or contract."

Dillon's Municipal Corporations, section 66, third edition, says:

"That municipal corporations, as ordinarily constituted, possess, according to many courts, a double character; the one governmental, legislative, or public; and the other, in a sense, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents, or officers, in the execution of corporation duties and powers. In its governmental or public character, the corporation is made by the State one of its instruments or local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State, and not for itself. In this respect, it is assimilated in its nature and functions to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which created it. Over all its civil, political, or governmental powers, the authority of the Legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in some peculiar provision of the constitution of the particular

State. But in its proprietary or private character, the theory is, that the powers are supposed not to be conferred primarily, or, chiefly, from considerations connected with the government of the State at large; but for the private advantage of the particular corporation as a distinct, legal personality, and as to such powers and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded as *quo ad hoc*, a private corporation." (Oliver *v.* Wendell, 102 Mass., 489; Detroit *v.* Covey, 9 Mich., 154; Hill *v.* Boston, 122 Mass., 344; Greenwood *v.* Louisville, 13 Bush, 226; Fisher *v.* Watson, 104 Mass., 98; Wrightman *v.* Washington, 1 Black, 39–53.

The fire department is an instrument created by the State for the purposes of State government and for the public benefit, and over it the State has complete control; but a successful operation of this governmental agency requires that there should be furnished water to the public fire cisterns, and public fire plugs or hydrants of the city of Louisville; but for this needed supply, the State of Kentucky could not, without compensation, appropriate the property of the city of Louisville, held by it in its proprietary right, or the property of the Louisville Water Company, any more or to any greater extent than it could appropriate without compensation the property of a natural person for the same purpose. Again, it must be taken as true that what the State is forbidden to do by direct action it can not legally do by indirection, and if it be that the State could not, in the first instance, without just compensation, appropriate the service of the Louisville Water Company to aid in the successful operation of an agency of the State government, it is perfectly clear that it can not, after thus appropriating the service on a guarantee of compensation, recall the guarantee and refuse to receive the service.

In the case of Louisville *v.* The Commonwealth, 10 Bush 47, the Kentucky Court of Appeals say:

"The Legislature may create corporations whereby certain liabilities and duties are assumed by the latter, and, in consideration of which, rights and privileges are granted that no legislation, without the consent of the parties interested, can impair or diminish. In such cases the expectation of benefit to the public is the moving consideration on one

side, and that of expected renumeration for the expenditure on the other."

In other words, the rule is here announced that rights and privileges allowed by the State to corporations in expectation on the part of the State of benefits to the public, and in expectation on the part of the corporations of a remuneration for the expenditures, are not subject to revocation or repeal by the State at its pleasure under the provisions of section 8, chapter 68, of the General Statutes.

In the case of Covington *v.* Covington, 10 Bush, 76, the Kentucky Court of Appeals say:

"It is settled by an unbroken chain of authority that the charter of a private corporation may vest such rights in the corporation and stockholders that no subsequent legislation can impair or diminish."

In Commonwealth *v.* Essex, 13 Gray, 239, the Supreme Court of Massachusetts say:

"When, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate excise of the powers granted."

Morawetz, Private Corporations, section 1055, says:

"Any right, privilege, or immunity conferred upon a body of corporators by the Legislature of the State in the exercise of its power to bind the State by contract or treaty, and not merely in the exercise of its law making power, is binding upon the State, and can not be impaired by subsequent legislation. If the right, privilege, or immunity was conferred by the State in the charter under which the corporation was formed or subsequently, for a valid consideration, it will usually be held that it was intended by the Legislature as an irrevocable grant. Thus it has been repeatedly held that an exemption from taxation conferred upon a corporation by its charter is binding upon the State and can not be impaired by subsequent legislation; so, if the liability to taxation is limited by the charter to a certain amount, it can not be subsequently increased."

Morawetz on Private Corporations, section 1101, says:

"A contract between the State and the corporation, if collateral to the grant of the charter, would likewise be beyond the control of the State under a reservation of the power to alter the charter. Stipulations contained in the charter itself would ordinarily be deemed merely conditions of the grant of the charter, and would, therefore, be subject to a reservation of the power of alteration and repeal. But it is not inconceivable that a charter of incorporation should contain an independent contract between the State and the corporation which would not be affected by a reservation of legislative power over the charter alone." (See 79 Ky., page 73, Commissioners Sinking Fund *v.* Barren River Navigation Co.)

In the case at bar the service required by the first section of the act under consideration was in aid of the efficient operation of an agency of State government, an agency created by the State, over which the corporations named had no control, and in which they had no more interest or concern than other corporations of the State. The State had the same right and power to make compensation for this service by the grant of an exemption, franchise, or privilege as it had to make compensation for it out of the public treasury. It will be observed that the act of the 22d of April, 1882, contained but two sections; by the first the service required is appropriated to public use, and by the second compensation therefor is made. This act of the 22d of April, 1882, is no more the grant of a franchise or privilege to the plaintiff in error than a proposal of the State to purchase from and pay to the plaintiff in error out of the public treasury for land or other property which the State might need for public purposes, or would be the grant of a franchise or privilege, and which, when accepted, would constitute a contract between the parties. A legal demand on the public treasury must be supported by no other consideration than that which sustains an exemption, and the mere fact that the act of the 22d day of April, 1882, is styled an amendment to the charter of the Louisville Water Company, and is in the form of a statute, can make no difference whatever. Without regard to the form of the instrument or its punctuation, the court will consider it and gather from the whole of it the intention of the parties to it, the purpose

it was intended to subserve, and the object the parties had in view. As said by this court in the case of New Jersey *v.* Yard, 95 U. S. 552 104–117:

"The principal function of a legislative body is not to make contracts but to make laws, but it has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions, which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution."

In the case of Fisk *v.* Police Jury, 116 U. S., 131-135, the court said:

"But after the services have been rendered under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract, its obligation is perfect, and rests in the remedies which the law there gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class, in which any party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising in a promissory note."

In the case at bar, the State, by the first section of the act of April 22d, 1882, appropriated to public use the service therein provided for, and in the second section of the act provided compensation for the appropriation and the right to the guaranteed immunity vested at once in the Louisville Water Company.

In the case of Hill *v.* Glasgow, 41 Federal Reporter, 610, the Justice said:

"The legislature may change and modify the privileges and franchises which the State has granted to the corporation and which concern the interest of the public, but dealing with what it has bestowed, either by way of withdrawal or of alteration, the State may not go further, and so legislate as to disturb, affect, or impair rights, either of the corporation

or its shareholders previously acquired, while the corporate functions were being lawfully exercised. All rights thus acquired, of whatever character, are surrounded and protected by constitutional sanctions and guarantees higher and superior to the legislative power of amendment or repeal."

In the case of Shields *v.* Ohio, 95 U. S., 319–324, the court said:

"The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions, and are as inviolable as in other cases."

In the case of Greenwood *v.* Wright, 105 U. S., 13–18, the court said:

"Personal and real property acquired by the corporation during its lawful existence, rights of contracts, or choses in action, so acquired and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such repeal."

In the case of Fletcher *v.* Peak, 6 Cranch, 87–135, the court said:

"If an act be done under a law, a succeeding Legislature can not undo it. The past can not be recalled by the most absolute power; conveyances have been made, these conveyances have vested legal estates, and if these estates may be seized by the sovereign authority, still that they originally vested is a fact, and can not cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law can not divest those rights."

In the case of the People *v.* O'Brien, 111 N. Y., 51, the court said:

"An interpretation, conferring the power of violating a contract at will upon one of its parties under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of the parties lawfully to create."

This same idea is forcibly expressed in the opinion of Mr. Justice Bradley in the Sinking Fund cases:

"The reserved power in question is simply that of legislation to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void." (99 U. S., 700.)

It must be taken as true that the reserved power is a power over the franchises and privileges of the State, not over franchises or privileges which have vested in and by contract become the property right of the grantee. The reserved powers can never be exercised so as to disturb the vested rights of property in the grantee. Such a construction is not warranted by the act, and would be a plain, palpable violation of the Constitution.

Having critically examined the provisions of the act of April 22d, 1882, we desire, at this point, to call attention to the opinion of the Kentucky Court of Appeals in this case, and an examination of it discloses that it was held by that court as the reasons for their conclusion, that the stock of the Louisville Water Company was the property of the Commissioners of the Sinking Fund of the city of Louisville; that the Commissioners of the Sinking Fund of the city of Louisville, "although a separate and distinct corporation, was, in fact, only the money-making branch of the municipal government;" that, in consequence of this fact, the stock of the Louisville Water Company was, in fact, the property of the city of Louisville, which it held in its private capacity and not for governmental purposes; that it was useless to enquire why the first section of the act of April 22d, 1882, required the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of cost; that it made no difference to the city of Louisville whether it paid a million dollars or a penny for this service; that the water provided for and required to be furnished was for

the benefit of the city of Louisville in its proprietary or commercial capacity; that the State was only incidentally benefited by it, and that, in consequence of these reasons, the alleged contract was without consideration and void; that, in fact, there was no contract. The Kentucky Court of Appeals overlooked the fact that the water service provided for by the first section of the act of April 22d, 1882,. was to be supplied to the public fire cisterns and fire plugs or hydrants of the city of Louisville "*for fire protection;*" that these public fire cisterns, public fire plugs, etc., were parts of the fire department provided for in section 101 of the act of March 3d, 1870; that this "fire department" was as separate and distinct from the city of Louisville in its corporate capacity as it was separate and distinct from that of Covington, Frankfort, or Paducah; that this "fire department" provided for by the section referred to was an instrument of State government and was instituted for State purposes (13th Bush, 226), and did represent and was an agent or instrumentality of the State government. When the water provided for in the first section of the act referred to was furnished in the depositories named, neither the city of Louisville nor the Commissioners of the Sinking Fund, nor the Louisville Water Company, had any more right, title, or interest in it than in the public buildings of the State. No agency, means, or equipment of the "fire department" by any means known could be subjected to any demand against the city of Louisville. No one at this day will dispute this proposition; and if it be that the Kentucky Court of Appeals are right in the conclusion reached, then the remarkable result has been achieved of subjecting public property, instruments of State government, to the demands of the creditors of one of the sub-divisions of the State, and the jails, public school houses, highways, court houses, etc., if situated in a particular district, could be subjected and sold in satisfaction of demands against it.

In the case of Merriwether *v.* Garrett, 102 U. S., 472, this court said:

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In the case of Merriwether *v.* Garrett, 102 U. S., 472, this court said:

"Property held by the city of Memphis for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose carriages, engineering instruments, and generally all things held for governmental purposes, can not be subject to the payment of its debts. Upon the repeal of the charter such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn."

In Leonard *v.* Brooklyn, 71 N. Y., 499, the court said:

"Such property is held by the corporate authorities which constitute a part of the government, for the use, benefit, and protection of its citizens. It is purchased with money realized by taxation on the property of the inhabitants, and is held in trust for the purpose of administering the government of the city."

In Darlington *v.* New York, 31 N. Y., 193, the court said:

"The property held by municipal corporations for the purposes of government is public property, devoted to specific public uses, in the same sense as similar subjects in the use of the State government."

In the case of Rochester *v.* Rush, 80 N. Y., 380, the court said:

"A bell tower from which the alarm of fire may be sounded can not be considered more necessary in the scheme of municipal affairs and good government than water works which will furnish the means of extinguishing the fire when its existence is announced. No case has been cited to the effect that property wholly devoted to public use, either by the manner of its occupation or the statutory direction as to the application of revenues, can be taxed." 53 N. Y., 128; 19 N. Y., 116; 13 N. Y., 143; 17 Wallace, 322; 116 Mass., 193; 4 Gray, 500; 36 Cal., 220; 44 Conn., 360.

By the act of the 22d of April, 1882, the private property of the Louisville Water Company is appropriated and applied as a necessary means to the efficient operation and management of a department organized by the State to afford protection against loss or destruction by fire, and the Court of Appeals of Kentucky, in its opinion, announces, first, that it is no appropriation by the State; and secondly, if it is, that it is not for the public, but for a private

purpose; that the property taken remains the private property of the city of Louisville in its commercial capacity.

But again the Court of Appeals of Kentucky, after reciting, in their opinion, the second section of the act of April 22d, 1882, said:

"We have, therefore, an express recital by the Legislature of its reasons for the attempted exemption, and that this was the true and only one is confirmed beyond question by the other recitals of the act."

As there are no other recitals in the act than those copied in the opinion of the court, as the opinion contains every word of the recitals, we are at a loss to understand how the reason manifested by the recital copied is, or can be, confirmed beyond question, or confirmed at all by recitals not in the act, or to be found any where else; and, besides, this opinion of the Kentucky Court of Appeals is the first instance in the annals of legal literature where the validity of a contract was made to depend upon the reasons of both or either party entering into it.

The court then proceed in their opinion, as follows:

"The question therefore is, did the fact that the Sinking Fund (or in other words, the city), owned the Water Company stock constitute a valid consideration for the exemption."

No such question was presented in the case, no such contention was made, such a question is not presented by the record, nor had the Court of Appeals the right to arbitrarily assume that what they assign were the only reasons for doing an act, or was the only consideration for doing it, and that, too, in the face of an expressly recited consideration in the act valid and sufficient to uphold the exemption.

Again the Court of Appeals in their opinion, said:

"If it be said that the exemption should be upheld, if it be in fact supported by any valid consideration, although the recited one be invalid, we reply that the real consideration, and the one which moved the parties to the transaction, is to be regarded. The one acted upon by

the Legislature, and expressed in the act, and which must have been understood by the city, was the simple fact that it owned the stock in the Water Company. This was not a valid consideration."

According to the opinion of the Court of Appeals there are two considerations expressed in the act, the service provided for in the first section, which is valid and sufficient to support the exemption; but the court says that it is "useless" to consider this one, because it was not the reason for the exemption; that the reason for the exemption is the only consideration that can be considered in support of the exemption. This court in the case of the Home of the Friendless *v.* Rouse, *supra*, announced the rule universally recognized in all courts, that it is not necessary that the consideration for the exemption should appear or be recited in the act, and in the case of Gordon *v.* Winchester, 12 Bush, 114, the Kentucky Court of Appeals say:

"Whenever, by accepting such privilege, the grantee becomes bound by an express or implied undertaking to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be, for the Legislature being vested with the power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered in consideration therefor, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them."

The last reason assigned by the Kentucky Court of Appeals for their conclusion is in these words:

"We have a general law taxing water companies, and if one company be exempt, that of any other city has an equal right to ask the same privilege."

This clearly gave effect to the revenue law of 17th May, 1886.

Our answer to this is that the Louisville Water Company is the only one in the State required by its charter or contract to supply water for fire protection free of charge.

Under the provisions and by the authority of the act approved

May 17th, 1886, *supra*, and in disregard of the exemption contained in the act of April 22d, 1882, the assessor of the county of Jefferson proceeded on and as of the 15th day of September, 1886, to and did assess all the property and estate of the Louisville Water Company, and all of which property and estate described in this petition in this case is situated and located in Jefferson County, Kentucky, at a valuation of $2,215,00.00, which assessment was certified by the clerk of the Jefferson County Court to, and placed in the hands of William Clark, sheriff of Jefferson County, for and he was proceeding and threatening, in the exercise of the ministerial powers with which he is invested as a collector of State taxes, to levy on and sell the property of the Louisville Water Company to cover the payment and collection of the taxes levied by the statute on this assessment as made out by the assessor, and to prevent this threatened levy and sale the Louisville Water Company instituted, in the Louisville Law and Equity Court, this action, and therein sought a perpetual injunction against the threatened action of the sheriff on the ground that the act of April 22d, 1882, was a contract by and between the Commonwealth of Kentucky and the Louisville Water Company, wherein and whereby it was agreed that in consideration of the agreement of the Louisville Water Company, for the successful and efficient management and operation of a fire department, established by authority of the State, in the city of Louisville, for the protection of property, public and private, in the city of Louisville, against loss or destruction by fire, to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of cost, the Commonwealth agreed that the Water Company should be exempt from the payment of taxes of all kinds, of whatever character, State, municipal, or special; and relying on said contract and in performance of the duty which thereby became public, it had at all times on and since April 22d, 1882, and continued to furnish and supply with an abundance of water the public fire cisterns and the public fire plugs or hydrants of the city of Louisville for

fire protection free of cost, and in the petition it specially set out and alleged that:

"Said act of the General Assembly of the Commonwealth of Kentucky, approved on the 22d day of April, 1882, and entitled 'An act to amend the charter of the Louisville Water Company,' and the acceptance of and consent to the same by this plaintiff as a part of its charter, constituted and constitutes a contract by and between the Commonwealth of Kentucky and this plaintiff, and that the exemption and immunity from and of taxation secured and given by said act in consideration of the undertaking to, and the supplying by this plaintiff, free of charge, the public fire cisterns, the public fire plugs, and hydrants, in the city of Louisville, with water, as a protection against loss or destruction, by fire, of the property of the Commonwealth and its citizens, so far as located in the city of Louisville, is a vested right, rests in a contract as aforesaid, and is sustained, supported, and protected by the Constitution of the United States."

On the trial of the action in the court of first instance, that court, as required by the statute (section 1, chapter 37, of the General Statutes) took judicial notice that, inasmuch as the act of May 17, 1886, repealed all and every law authorizing any property in Kentucky to be taxed for State purposes and substituted its provisions for all antecedent tax laws, the taxes in contest could not have been imposed under any other statute than that of May 17, 1886, and, in addition thereto, their assessment, according to the provisions of that act, are expressly alleged in the petition; and, further, the court of first instance held that the act of April 22, 1882, constituted a contract by and between the Commonwealth of Kentucky and the Louisville Water Company; that the service provided for in the first section of the act was a public and governmental service, and had, at all times, been on, and since the 22d day of April, 1882, faithfully and fully performed by the Louisville Water Company; that the right to the exemption guaranteed by the act had become vested in the Louisville Water Company, and that it was entitled to and was granted a perpetual injunction to restrain the collection of the tax in question. On appeal by the defendant in error to the Kentucky Court of Appeals, the court,

after full argument, was equally divided, and, in consequence thereof, the judgment was affirmed; subsequently, on a motion of the defendant in error for a rehearing under a rule of the court, two of the judges favoring it, a rehearing was granted, and the ultimate result was that three of the justices, against one, concurred in the opinion, which resulted in the reversal of the judgment of the Louisville Law and Equity Court, and necessitated the transfer, by writ of error, into this court.

The remaining quesion to be considered is, whether the facts as herein set out give jurisdiction to this court?

As To Jurisdiction.

The question of jurisdiction must have been considered by this court on the motion for a writ of error to the Court of Appeals of Kentucky in December, 1890, and again when briefs were filed in obedience to the order on the 5th of January, 1891, as to the existence of the contract, and again upon the motion of defendant to affirm and dismiss, in April, 1891, and we, therefore, having reference to our former briefs on this question, submit the following on that branch of the subject:

In the case of Wright *v.* New Jersey, 117 U. S., 1024, this court said:

"When it is charged that the obligation of a contract has been impaired by a State law, as in this case, by the general tax law of New Jersey as administered by State authorities and the State court justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection."

The Supreme Court of the United States, in Jefferson Branch Bank *v.* Skelly, 66 U. S., 173, said:

"It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceed-

ings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and can not be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court, in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation or has been made by a covenant or agreement by the agents of a State by its authority."

In the case of Murrey *v.* Charleston, 96 U. S., 432 to 449, this court say:

"The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of an express reference to some provision of the Federal Constitution. Whenever rights, acknowledged and protected by that instrument, are denied or invaded under the shield of State legislation, this court is authorized to interfere. The form and the mode in which the Federal question is raised in the State courts is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits where is drawn in question the validity of a statute of, or of an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity. Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it is necessarily involved without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly. In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State courts expressly assert a right under the Federal Constitution. The true test is not whether the record

exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held, that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In Crowell *v.* Randall, 10 Peters, 368, it was laid down, after a review of almost all our previous decisions, 'That it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, in *ipsissimis verbis*, but that it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised, and must have been decided in order to have induced the judgment. This case is followed by Armstrong *v.* Athens Co. Treas., 16 Peters, 281, when it was held sufficient to give this court jurisdiction. If it appear from the record of the State court that the Federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it."

In the case of Bridge Proprietors *v.* Hoboken, &c., 1 Wallace, 116, this court say:

"Looking at the record before us and applying to it these principles, we find no difficulty in the matter. The defendants claim, under the act of 1860 of the New Jersey Legislature, a right to build their railroad bridge or viaduct over the Hackensack River, inside the limits prohibited by the act of 1790. The plaintiffs say, that to permit this is to violate the contract which they have with the State of New Jersey, and, therefore, the act of 1860, so far as it confers such authority on the defendants, is made void by the Constitution of the United States, because it impairs the obligation of a contract. The State court dismissed the bill on these pleadings alone. It could not have done this without holding the act of 1860 to be valid, as it was the only authority in which the defendants rested their right to build any structure whatever over the Hackensack River. In holding that act to be valid, notwithstanding the plaintiffs claim that it was void as impairing the obligation of their contract with the State of New Jersey, a decision was made within the very terms of the 25th section of the act of Congress of 1789. It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiff's

contract, and it is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State Legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

In the case at bar the defendant claimed the right of the State to tax the property and effects of the plaintiff, under authority of the act of May 17, 1886, notwithstanding the exemption from that liability, guaranteed byt he act of April 22, 1882. The plaintiff contended that to permit this, was to violate the contract between the Commonwealth and itself, as set out in the act of 1882; that by reason of section 10, article 1, of the Constitution of the United States, and the contract as set out, there existed no right or authority on the part of the State to tax its property or effects, under the provisions of the act of May 17, 1886, which was the only and sole authority, as the court judicially knew, for the imposition of the alleged taxes. The court held that the alleged contract, the act of April 22, 1882, did not exempt the property and effects of the plaintiff in error from the operation and force of the act of May 17, 1886, and this decision brings the case within the very terms of the 25th section of the act of Congress of 1789.

In the case of Furman *v.* Nichol, 8 Wallace, 44, this court say:

"The circumstances under which this court is authorized to review the decisions of the State tribunals has been so often considered and decided, that there is hardly anything left to do but to apply the already well settled principles which govern this class of cases to a particular record in order to decide whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through the various adjudications of this court on this subject. It is enough for the purposes of this suit to say that a cause can be removed from a State court into this court under the 25th section of the judiciary act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him was denied to him by the State court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to the case, should be contained in the pleadings, but this is in no case necessary. If the record

shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches, and it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did. . . . . All courts take notice without pleading of the Constitution of the United States and the public laws of the State where they are exercising their functions. . . . . The defense really amounts to this, either that the alleged contract did not exist, or if it did, that there has been no legislation that impairs it. Whether it be true or false, depends upon the construction to be given the laws of the State which are claimed as proving the making of the contract and its violation. If so, this court decides for itself whether the construction which the court below gave to these different statutes was correct or incorrect, and we are required to reverse, under the 25th section of the judiciary act, if we find that under an error of construction that court was adjudged that no contract has been impaired. To do otherwise would be to surrender to the State courts an important trust confided to this court by the Constitution. Without pursuing the subject any further, it is clear, from the record, that the Supreme Court of Tennessee, in dismissing the petition for mandamus, necessarily adjudged that there was not at the time such a contract as the plaintiff, Furman, claimed, authorized him to make the tender to the clerk of the notes of the Bank of Tennessee. The jurisdiction of this court is therefore complete, and the case must be decided on its merits." Williams *v.* Bruffy, 96 U. S., 176–193; Arrowsmith *v.* Harmoning, 118 U. S., 194; Chicago *v.* Needles, 113 U. S., 574; Northern University *v.* The People, 90 U. S., 309; Baltimore *v.* Maryland, 21 Wallace, 456; Weston *v.* Charleston, 2 Peters, 499.

In the case at bar the plaintiff in error contended that the act of April 22d, 1882, was a contract between the State and itself, and vested in it a right to immunity from taxation by the State, and that by the Constitution of the United States, the State was forbidden to impair it. The court below decided the act of April 22, 1882, accepted by the Louisville Water Company, was no contract between the State and the plaintiff in error, that it did not invest the plaintiff with immunity from taxation by the State, that it was not protected by the Constitution of the United

States, and that the imposition of taxes by the State under the provisions of the act of May 17th, 1886, consequently impaired the obligation of no contract. These issues were expressly made in the case and decided adversely to the plaintiff in error, and were necessarily decided in the judgment rendered, and we submit that this court has jurisdiction, and the case is properly in this court for final determination on its merits.

Respectfully submitted.

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CLERK

Supreme Court of the United States.

THE LOUISVILLE WATER CO., Plaintiff in Error,

VERSUS

WILLIAM CLARK, SHERIFF, ETC., Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM LINDSAY,
Counsel for Defendant in Error.

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ROUNDABOUT PRINT, FRANKFORT, KY.

Supreme Court of the United States

THE LOUISVILLE WATER COMPANY, PLAINTIFF IN ERROR,
VERSUS
WILLIAM CLARK, SHERIFF, ETC., DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The two principal briefs on file, the one for the plaintiff and the other for the defendant in error, set out so fully the history of the transactions leading up to this litigation, and the statutes of Kentucky bearing upon the controversy, that it will only be necessary in this supplemental brief to direct the attention of the court to the points at issue, and the decisions of this court and the appellate court of Kentucky applicable to those points.

STATEMENT.

Without referring to the various acts of the Kentucky Legislature creating the Louisville Water Company, and, from time to time, changing its powers and regulating the discharge of its duties, it is sufficient to say that prior to April 22, 1882, that company had the statutory right to charge, and did charge, the city of Louisville for all water furnished that city for use in the public fire-plugs, cisterns and hydrants it kept and maintained.

It is further true, as averred in the petition and not denied by the answer, that in 1882, and since then, it has cost the Water Company $10,000 per annum to furnish the city with water for use in its fire-plugs, cisterns and hydrants. Prior to 1871, the city of Louisville became the holder of a large portion of the capital stock of the Water Company. By an act approved March 30, 1871, the Commissioners of the Sinking Fund of the city of Louisville were authorized to purchase and hold all the capital stock of the Water Company. (See principal brief of plaintiff, page 6.) All the capital stock of that company in the end became vested in the Sinking Fund Commissioners, except two or three shares, and on the 22d of April, 1882, those Commissioners were the virtual owners of the water-works, and, through the directory they could and did elect, exercised absolute control over the management of the affairs of the Water

Company. The statute of 1871 declared that the Commissioners were to hold the stock of the Water Company "as a part of the Sinking Fund of said city."

By the 10th section of an act approved March 9, 1867, it was enacted that the whole resources of the Sinking Fund of the city of Louisville should be--

"Sacredly set apart to the payment of the principal and interest of the city's debt, chargeable upon the said fund, and to no other use or purpose, until the whole of the debts of city are fully paid and satisfied, including the present and any future indebtedness of said city."

The Commissioners were, by said act, created a body-corporate, with power to sue and be sued, and to do and perform all things necessary to execute the duties required and powers given them by the act. The general council of the city was empowered to increase the resources of the fund, but forbidden to reduce the same. (See plaintiff's principal brief, page 5.)

By an act approved March 25, 1869, the stock of the Water Company held by the city of Louisville was added to the then resources of the Sinking Fund, and it was again declared that said fund should be and remain under the control and management of the Commissioners, and held and sacredly used for the payment of the principal and interest of the bonded debt of the city, and it was expressly declared that the resources of the fund should not be diminished.

(See plaintiff's principal brief, page 6.)

While all the resources of this Sinking Fund were thus held and controlled by the corporation, "The Commissioners of the Sinking Fund," with no power in the city council to diminish them, and, so far as the holders of the bonds of the city, who purchased subsequent to the 15th of March, 1869, were concerned, with no power in the General Assembly of Kentucky to diminish them, the General Assembly, on the 22d of April, 1882, passed the following act, under the title "An act to amend the charter of the Louisville Water Company."

"SEC. 1. That it shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville, for fire protection, free of charge.

"SEC. 2. The Sinking Fund of the city of Louisville, being the owner of the stock of the Louisville Water Company, and the Water Company, by virtue thereof, is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted from the payment of taxes of all kinds, of whatever character, State, municipal, or special."

The Water Company, in obedience to the will of the Commissioners of the Sinking Fund, who owned virtually all its stock, as truly recited in the second section of said act, accepted the amendment by acquiescing in, and acting upon and obedience to its provisions and requirements, and from and after the 22d of April, 1882, the Water Company has furnished and continues to furnish an ample supply of water to the public fire cis-

terns and public fire plugs or hydrants of the city of Louisville, free of charge to the city, and at an annual outlay to the Water Company of $10,000.

In 1886, the General Assembly of Kentucky enacted a new and comprehensive revenue law. It went into effect May 17, 1886. The provisions applicable to this case are printed *in extenso* in plaintiff's printed brief. (Pages 16, 17 and 18.)

The Commonwealth, in disregard of the exemption provided for by the act of April 22, 1882, caused the property of the plaintiff in error to be assessed for taxation for general revenue purposes in the fiscal year of 1886 and 1887, said fiscal year commencing July 1, 1886. Out of an attempt by the collecting officer (the defendant in error, William Clark, sheriff of Jefferson county,) to enforce the payment of these taxes, this litigation originated. The plaintiff claimed that the act of 1882 constituted a contract between the State and the Water Company, which the State could not violate, either by express legislation or by an authority exercised for its advantage and benefit, because of the provision of the Federal Constitution, inhibiting the States to pass laws or grant authority to impair the obligations of contracts.

The Judge of the Louisville Law and Equity Court sustained the claim of the Water Company and enjoined the collection of the alleged taxes. But upon

appeal to the Court of Appeals that court overruled the claim to exemption and entered a final judgment remanding the cause to the Law and Equity Court, with instructions to compel the Water Company to pay and satisfy the tax as assessed and levied.

JURISDICTION.

The application for the writ of error in this cause was argued to the full bench. Afterwards, January 5, 1891, the court ordered the parties to file printed briefs upon the "question of the existence of the contract, the impairment of which is claimed to justify the issuance of the writ applied for." These briefs were filed, and the writ was awarded by order of the court. Subsequently the defendant in error moved to have the writ dismissed upon grounds, some of which necessarily involved the question of jurisdiction. That motion was denied. From all this it would seem that the question of jurisdiction ought to be treated as closed, but it is elaborately discussed, and the jurisdiction denied in the printed brief of counsel for defendant in error. That the acceptance by the Water Company of the amendment of April 22, 1882, may be treated *prima facie* as the consummation of a contract is not denied. Nor is it denied that the subsequent act of 1886 creating the new revenue system was intended to repeal the clause of the act of 1882 exempting the Water Company from

"the payment of taxes of all kinds, of whatever character, State, municipal or special." But counsel referring to the agreed facts upon which the motion for the writ of error was argued, for their information, say that in the State court counsel for the Water Company "denied that the act of 1886 repealed the exemption conferred by the act of 1882, but insisted if it did so, or attempted to do so, that the said act of 1886 was void as in conflict with the Federal Constitution," and then add that it seems—

"Too plain for further argument that if this court, upon a consideration of the act of 1886, agrees with the position taken by counsel for the Water Company, before the case came to this court, and concludes that the act of 1886 was not an attempt to repeal the act of 1882, then there has been no attempt on the part of the State of Kentucky to pass any law impairing the obligation of any contract, and consequently this court has no jurisdiction to revise the judgment of the Court of Appeals." (See defendant's brief, page 8.)

Counsel then, on page 13 of their brief, very kindly and with marked ability summarize the grounds upon which they say counsel for the Water Company "have heretofore always insisted that the act of 1886 did not repeal the act of 1882."

These supposed grounds do not appear in the transcript of the record of this cause, or in any paper connected with it, not excepting the agreed facts upon which the motion for the writ of error was rested.

All this may possibly mean that the mistakes made by the counsel for the Water Company in the preparation and presentation of its case in the State courts have put it under a moral estoppel to claim that this court has jurisdiction to afford the relief asked. But upon the same principle, inasmuch as counsel for the defendant in error have always claimed, and now assert, that the act of 1886 was intended to repeal, and did repeal, the act of 1882, they are equally estopped to ask this court to accept any other theory, and we have a case in which one estoppel may be set off against the other.

There is no pretense that there was any statutory authority to assess the property of the plaintiffs in error, or to require it to pay the taxes in contest, other than the revenue law of 1886.

No matter what the act of 1873 may have provided, that act, so far as it applied to the property of the Louisville Water Company, was repealed by the act of April 22, 1882, if it was a valid enactment, and the acceptance of the provisions of that act by the Water Company constituted a valid contract. The act of 1873 was repealed by the revenue act of 1886. Therefore, these taxes were necessarily levied in virtue of the act of 1886, and this court must have the power to decide, first, whether the act of 1882, and its acceptance by the Water Company, constituted a valid contract between

the Commonwealth of Kentucky and the Water Company; and if so, second, does the act of 1886, as applied and enforced by the Kentucky Court of Appeals, impair the obligations of that contract?

It is true the Court of Appeals, in the majority opinion, no where states that the act of 1886 repeals the act of 1882. But it does, in effect, say that it enforces the payment of the taxes in contest because of the provisions of the act of 1886. On page 36, printed transcript, the court will find this language in the opinion of the State court:

"The so-called contract was, therefore, void at its inception. Instead of being impaired in any way forbidden by law, it never had any existence; and it seems to us well that we feel at liberty to so declare, because we have a general law taxing water companies, and if one company be exempt, that of any other city has an equal right to ask the privilege."

This quotation, by fair implication, establishes the two propositions, first, that the general law of 1886 was the authority relied on to justify the assessment of plaintiff's property for taxation, and to warrant the order of the Court of Appeals directing the coercive collection of the taxes levied; and second, that the Court of Appeals did consider and overrule the point, that the act of 1886, as understood and applied, impaired the obligations of the "so-called contract," and was, therefore, repugnant to the Constitution of the United States.

In their printed brief (page 12) counsel for defendant in error say they believe "the act of 1886 was intended as a repeal of the act of 1882." The Court of Appeals, without so saying in words, treated the act of 1886 as a repeal of the second section of the act of 1882. For these reasons, further discussion of the question of jurisdiction is deemed unnecessary.

DID THE ACT OF 1882 AND ITS ACCEPTANCE INVOLVE CONTRACT RELIED UPON BY PLAINTIFF IN ERROR?

The Court of Appeals of Kentucky decided that the exemption from taxation provided for by the act of 1882, rested upon no sufficient consideration, was in fact a mere gratuity, and, therefore, invalid from the beginning, because in conflict with the provision of the Kentucky Constitution that "no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services."

The opinion does not treat the service required to be rendered by the Water Company, as not a public service. It seems to waive the decision of that question, although it was much pressed by counsel for Clark, who was the appellant in the Court of Appeals. Some slight intimation was thrown out that a local public service might not be a sufficient consideration to support an exemption from the pay-

ment of State taxation, but that point the court passed without discussion or decision. The first proposition is not insisted upon in this court. It may be taken for granted that the doctrine declared and enforced in the cases of Louisville Gas Company v. Citizens Gas Light Company, 115 U. S., 513; and N. O. Water Company v. Rivers, — Ib., 557, and New Orleans v. Clark, 95 U. S., 6, is regarded by counsel as conclusive of the question, so far as this court is concerned. This court has not stated the doctrine more broadly than it was stated and enforced by the Kentucky Court of Appeals in City of Newport v. Newport Light Company, 84 Ky. Reps., 166. In that case, the 115 U. S. cases and the case in 95 U. S., were each and all referred to as sustaining the decision therein rendered, and the following quotation was made (with manifest approval of the rule declared) from the opinion of Mr. Justice Harlan in N. O. Gas Co. v. Louisiana Light Co.:

"It is difficult to perceive upon what ground we can deny her authority (the State's), when not forbidden by her organic law, in consideration of money to be expended, and important service to be rendered for the promotion of the public comfort, the public health or the public safety, to grant a franchise to be exercised exclusively by those who thus do for the public what the State might undertake to perform, either herself or by subordinate municipal agencies."

These cases not only decide that the furnishing of gas lights and water to cities is the rendering of public

service, but proceed upon the idea that those who perform such services "do for the public what the State might undertake to perform, either herself or by a subordinate municipal agency."

Speaking of supplying New Orleans with light, this court said, in the case of the N. O. Light Co. v. The Louisana L. & H. Co.:

"And as the object to be attained was a public one, for which the State could make provision by legislative enactment," &c.

The object was one for which the State could have made provision by legislative enactment. The service was one that the State might have undertaken to perform herself.

It may be true, as counsel for defendant in error contend, that it was not an absolute duty upon the part of the State of Kentucky to furnish the city of Louisville with water for fire protection, free of cost. But it was a service the State might render that city, if, in the exercise of legislative discretion, it was deemed expedient and proper to do so. The contention, that a State can not constitutionally render such a service, reverses the true theory of government. Out of the existence of the absolute right (and the discretionary duty of the State, as to the means to promote the public health, the public comfort, and the public convenience, and to protect public and private property) springs the

power of imposing upon local communities the expense of promoting the local public health, comfort and convenience, and in no State has this doctrine been more broadly stated than in Kentucky.

"The power to coerce local contributions for such objects (local convenience), being established by general usage, and by the apparent justice and propriety of the thing, and being deducible from the general powers and duties of the government, it belongs primarily to the Commonwealth as a legislative power, inherent in it, and which can not be exercised by any portion of the people * * * * * * except so far as such portion of the people may be authorized by the legislative power of the Commonwealth to act upon the subject with obligatory force." Slack v. Maysville, 13 B. Mon., 27 and 28.

The power to authorize the local imposition to aid in the construction of the proposed railway was deduced from the general powers and duties of the State government to supply such conveniences, and such local imposition was justified, upon the ground that the local community was specially and exceptionally benefited. In such cases the question is not whether the particular tax must be local, but whether it is one that can be constitutionally exacted from the local community. The rule is, that the State shall, at the general expense, take care of the health, comfort and convenience of all the people. The exception is, that the burden may be shifted from the State upon a particular

locality, when the benefits are specially and exceptionally local. But at all times and under all circumstances the discretion rests with the Legislature to determine the time and manner of providing for the comfort, health and convenience of a particular locality, as well as to what extent, if any, the expense shall be borne by the general public. In this instance it was determined that the expense of securing water for the general protection against fire of the city of Louisville should be paid by the exemption of the water works property from all taxation. The city to pay its proportion by the surrender of the right to tax that property for municipal purposes; the State, its proportion, by the release of the right to tax the property for general revenue purposes. If the State could not make this contribution to the payment of the expense in question, then it is because a sovereign State can not determine for itself when the health, comfort and convenience of the people of a city shall be promoted by direct State action, but must, under all circumstances, exercise that function of government through local municipal agencies, and at the sole expense of local communities. Certain it is, that no Kentucky case can be found giving countenance to any such rule of constitutional construction, and it is equally certain that the legislative and executive departments of the State government have uniformly acted upon the assumption

that there is no such limitation upon their powers. They have not hesitated to render local assistance at the general expense in cases of floods, cyclones, epidemics and political disturbances.

The Court of Appeals rests its decision upon the hypothesis that the Legislature did not attempt or intend to contract with the Water Company, but did intend the exemption from taxation to be a mere gratuity, bestowed because the water works property was, in fact and in law, the property of the city of Louisville. This decision is reached by setting aside the first section of the act of 1882 as entitled to no consideration, and then reasoning to the conclusion by an erroneous analysis of the language and recitals of the second section of that act.

The court says correctly, that according to the legislative recital, the Sinking Fund of the city of Louisville owns the entire stock of the Water Company, and then says, that while the Sinking Fund is a separate corporation from that of the city proper, it is merely the money making branch of the city government, having charge of its funds and investments, whether in bank, railroad, water company stocks, or other money making securities, and, therefore, that the property and rights of the Water Company belong to the city, and that while the act recites it to be the duty of the Water Company to furnish water to the city

free of charge, this could not have been the consideration inducing the exemption from taxation—

"Since it made no difference to the city whether a million dollars or a penny might be paid for this service, because it was the owner of the rights and property of the Water Company, and it would be but a payment to itself. It can not be supposed, therefore, that the Legislature intended to relinquish ten thousand dollars of taxes annually in consideration that the city would not charge itself for water furnished by itself."

The court then proceeds to say that the express recital of the act shows that the ownership of the Water Company by the Sinking Fund was the sole reason for the exemption from taxation, and that whilst the furnishing water might incidentally protect from fire the public buildings of the State, that fact could not support the exemption, and concludes that the privilege was not conferred for governmental purposes, but—

"Out of considerations relating to the private and pecuniary advantage to the city, and in which the State at large had no interest."

The court overlooked the true character of the Louisville Sinking Fund, and misapprehended the powers and duties of the separate corporation, "The Commissioners of the Sinking Fund." Whilst it is true that fund is held for the ultimate benefit of the city of Louisville, it is also held for the direct benefit, advantage and security of the creditors of the city. The Commis-

sioners are the trustees of an express trust. They hold, control and manage a fund sacredly set apart and dedicated to a particular purpose. The Commissioners are not subject to the control of the city, and the fund entrusted to their management, and all its resources, are beyond and above the authority of the city government. As we have seen, "the whole resources of said fund, from year to year, shall be sacredly set apart to the payment of the principal and interest of the city's debt, chargeable upon said fund, and to no other purpose." (Section 10, act March 9, 1867.)

"The Sinking Fund shall be under the control and management of the Commissioners of the Sinking Fund, and shall be held and sacredly used for the payment of the principal and interest of said bonded debt." (Section 4, Act March 19, 1869).

The act of 1867 provides that the General Council of the city of Louisville shall not diminish the resources of this fund, and the act of 1869, that those resources shall not be diminished even by the General Assembly.

The sum of money paid each year by the city of Louisville to the Water Company for supplying water to its fire cisterns, hydrants, &c., and the right of the Water Company to demand pay for such service, constituted a resource of the Sinking Fund, that the city government could not diminish, and that could not be diminished by the General Assembly without a

breach of faith with the Commissioners, and with every bondholder who had purchased a bond of the city upon the faith of the inviolability of the fund that had been sacredly set apart and dedicated to the payment of such bonds, principal and interest; and especially with a bondholder who had purchased upon the faith of the unqualified declaration of the act of 1869 that "the revenues of the Sinking Fund shall not be diminished."

The first section of the act of 1882 would have impaired the obligations of the contracts relied upon by the holders of the city bonds, if that section had not been supported by the exemption provided by the second. To have compelled the Water Company to supply the city with water free of charge would have diminished a resource of the sinking fund and impaired the security upon which the creditors of the city had been invited to purchase its bonds.

"Where a State has authorized a municipal corporation to contract, and to exercise the power of local taxation, to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute, and neither the State nor the corporation can any more impair the obligation of the contract in this way than any other." (4 Wallace, 535, 555).

If the power to tax in such a case is a trust that must be executed, a fund sacredly set apart to secure the payment of the debt in a similar case, must be a trust fund beyond the arbitrary control of a State Legislature.

Not only was the exemption provided for by the second section of the act of 1882 necessary to support the duty imposed by the first section, but the assent of the Commissioners of the Sinking Fund was also necessary. They could not be compelled to accept the the exemption in lieu of the compensation they had the right, through the Water Company, to demand each year, from the city for the water furnished for fire protection.

They held the stock of the Water Company, and all the profits lawfully accruing therefrom, under this legislative grant.

"The funds, estate and income belonging now or hereafter to said fund, shall be and is vested in, and be under the control and management of said Board of Commissioners, for the purposes herein declared; if injured, withheld or obstructed, said Board may sue for and recover the same, or any part thereof, in the corporate name." (Section 10, act 1867.)

Holding as they did, the legal title to the stock, and the equitable right to all its profits, with absolute control of the Water Company, through the Board of Directors elected by them, the Commissioners of the

Sinking Fund had the power, and it was their duty, by suit, if necessary, to prevent the withholding or conversion by the city of Louisville, of the amount of money annually payable for the water furnished for municipal purposes. And this duty, the Legislature could not prevent them from discharging, without disregarding the trust created for the benefit of the creditors of the city by the acts of 1867 and 1869, by the diminution of one of its resources. But as the representatives of the creditors of the city, as well as of the latter's interest in the trust fund, the Commissioners of the Sinking Fund had power to consent to the substitution of the exemption from taxation for the annual compensation paid by the city for the supply of water in question. Such consent was fairly within their discretionary authority to manage and control the fund. It was for these Commissioners to determine whether they would acquiesce in the proposed change, and by such acquiesence ratify and confirm the action of the Water Company in accepting the amendment to the charter. It was their acquiesence and approval that made the act of 1882 effective, and out of that acquiesence and approval there arose a contract between the State and the Water Company, of which the Sinking Fund is the direct beneficiary.

It must be taken that the General Assembly understood, when it came to enact the amendment of 1882, it

could not compel the Water Company to supply the city with water for its public fire cisterns and fire plugs, free of charge, without diminishing the resources of the Sinking Fund, and therefore, that the exemption from taxation provided for by the second section of the act, was intended as a substitute for the compensation, the Water Company had theretofore demanded and received for that service, under the pre-existing laws. If it did so understand, then the recital, that—

"The Sinking Fund of the city of Louisville being owner of the stock of the Louisville Water Company, and said Water Company, by virtue thereof, is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted," &c.,

read in connection with the first section of the act, not only does not lead to the conclusion reached by the Court of Appeals, but to a conclusion the exact reverse thereof.

If the second section of the act of 1882 stood alone, as the Court of Appeals treated it as standing, then the recital that

"The Sinking Fund of the city of Louisville, being the owner of the stock of the Louisville Water Company, and said Water Company, by virtue thereof, is the property of the city of Louisville,"

might be regarded as the single predicate upon which the exemption from taxation must rest. But when it is observed that the first section provides a valuable

consideration for the exemption, the importance of the inquiry, the Court of Appeals deemed it useless to make, becomes apparent. It was no doubt regarded a peculiar hardship that the city of Louisville, out of its ordinary revenues, should be compelled to afford fire protection, as well to the buildings owned by the State and the Federal Governments as to those owned by the city and its citizens. This hardship it was desirable to alleviate. To do so, the proposition was made that the Water Company should furnish the necessary water free of cost, and be compensated for that service by the proffered exemption from taxation. This proposition, when accepted, shifted a portion of the cost of the water supply upon the State, where it ought to have rested, and left the remainder to be borne by the city—all of which, when done, paid due regard to the rights of the Sinking Fund Commissioners and the bonded creditors of the city and properly apportioned the burden between the State and the local community.

For the plaintiff in error it is insisted, that the act of 1882 was a legitimate exercise of legislative power, and that its acceptance by the Water Company consummated a contract resting upon a valuable consideration, and that said contract binds the Commonwealth of Kentucky to respect the exemption from taxation therein provided for.

Counsel for defendant in error do not deny that so

much of the act of 1882 as required the Water Company to furnish water to the city of Louisville free of charge did reduce the resources of the Sinking Fund. But they ask, "to whom does this make a difference?" and answer, "the difference is solely to the creditors of the city. The creditors whose debts are charged on the Sinking Fund may suffer (unless some compensation be otherwise made), while the general creditors may gain; but the city, which is liable to all of its creditors, neither gains or loses one cent of its estate by a transfer of money from one of its funds to another of its funds." (Printed brief, page 34.)

This is an admission of all we need to claim. The repeal of the exemption does make a difference. The creditors who bought the city's bonds upon the faith of the Sinking Fund may suffer, but the general creditors of the city may gain. But these bond-holding creditors can not be made to suffer, that the general creditors may gain. The Sinking Fund, with all its resources, is in pledge for the payment of their demands, and the pledge includes so much of the law as declared that the resources of that fund should not be diminished until all the bonded indebtedness of the city should be paid.

Where the Legislature has authorized the creation of a Sinking Fund, to be applied to the payment of a certain class of debts, and credits have been ex-

tended, or the evidences of indebtedness have been changed, upon the faith of such fund and its due application, it is not competent for a subsequent Legislature to destroy or impair that fund, or to direct a different application of any part of it, because to do so would impair the obligation of contracts.

Dillon on Municipal Corporations, vol. 1, sec. 65

Liquidators v. Municipality, 6th La. Am., 21.

Taney v. Bank, 18 Wis., 93

THE GENERAL ASSEMBLY HAS NO POWER TO ANNUL, CHANGE OR MODIFY THE STAUTORY CONTRACT OF 1882.

Since 1856 the State of Kentucky has held or reserved certain powers of repeal, change and modification as to the charters of private corporations created by or under the laws of that State. The law now in force is in these words :

"All charters and grants of or to corporations, or amendments thereto, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed : *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." (Sec. 8, chap. 68, General Statutes.)

The charter of the Water Company ante-dates the 14th of February, 1856. It can not be repealed or

amended without the consent of the company. Amendments enacted since 1856 may be the subject of further amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed. But the contrary intent need not be directly and unequivocally expressed. It may be implied from the purpose or the effect of the amendment.

"The Legislature may create corporations whereby certain liabilities and duties are assumed by the latter, and in consideration of which rights and privileges are granted that no legislation, without the consent of the parties interested, can impair or diminish. In such cases the expectation of benefit to the public is the moving consideration on the one side, and that of remuneration for the expenditure on the other." (L. C. & L. R. Co. v. Commonwealth, 10 Bush, 47–48; Covington v. Covington, Ib., 76.)

When the charter, in addition to the usual grants of the necessary franchises and corporate privileges, also contains the stipulations of a contract between the proposed corporation and the State, whereby the former is required to perform certain service, in consideration for the grant of a particular privilege or exemption, the acceptance of the charter and the due performance of the service bring the case literally within the purview of words, "unless a contrary intent be therein plainly expressed."

"A legislative enactment in the ordinary form of a statute, may contain provisions which, when accepted

as the basis of action by individuals or corporations, become contracts between them and the State within the clause referred to of the Federal Constitution." (New Jersey v. Yard, 95 U. S,, 104.)

"An interpretation conferring the power of violating a contract at will, upon one of the parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of the parties lawfully to create." (People v. O'Brien, 111 New York, 51.)

"The reserved power in question is simply that of legislation to alter, amend or repeal a charter. This is very different from the power to violate or alter a contract at will. A reservation of power to violate a contract or alter it, or impair its obligation would be repugnant to the contract itself and void."

The above was the language used by Mr. Justice Bradley in his dissenting opinion in the Sinking Fund case (99 U. S.) It was concurred in by Justices Field and Strong, and the principle declared is not different from that announced by the Chief Justice in speaking for the majority of the court. The majority and minority differed only in its application to the case under consideration. (See 99 U. S., pages 720 and 721.)

Counsel cite numerous cases to show that where the sole consideration for the grant is the general benefit expected to result to the public, and no other corporate privileges and immunities, including immunity from taxation, may be recalled, modified or annulled,

at the will of the Legislature. A proposition we do not care to dispute.

The case of Griffin v. Insurance Company, 3 Bush, —, was the charter of a company that rendered no service, other than to conduct the business of insurance. Tomlinson v. Jessup, 15 Wallace, was a railroad company that rendered no service other than the operation of its road. So with the corporation in Railroad v. Maine, 96 U. S.; also in Atlanta Railroad Company v. Georgia, 98 U. S.; also in Hoge v. Railroad Company, 99 U. S.; also in Greenwood v. Freight Company, 105 U. S.

Where the only contract between the State and the corporation is, that the latter will exercise the franchises and privileges conferred, the reserved power to repeal or amend will reach any privilege, immunity or exemption granted, but not so when the act of incorporation includes a collateral proposition, looking to the reception by the State, or some of its municipalities, of collateral benefits of advantages, in consideration for which a special exemption or privilege is granted. In such a case the doctrine of the case of New Jersey v. Yard, 95 U. S., applies, and the collateral contract is within the protection of the Federal Constitution. In perfect harmony with the doctrine of that case is the leading decision in Kentucky.

In 1868 the General Assembly of Kentucky incorpo-

rated the Green and Barren River Navigation Company, and conferred upon it such corporate powers and privileges as were deemed necessary to enable it to carry out the purposes of its creation. By a provision of the act of incorporation the State offered to lease to the corporation for the period of thirty years the Green and Barren River line of navigation. After the organization of the corporation it complied with the conditions of the proposed contract of lease, and took and held possession of the improvements for a number of years. In 1880 the Legislature passed an act to repeal in part the act incorporating the company. The repeal applied to so much of the act as leased and conveyed to the Navigation Company the Green and Barren River line of navigation, and the benefits of the tolls and revenues arising therefrom. The repealing act also provided that the company should surrender the line of navigation to the Commissioners of the Sinking Fund. A refusal to surrender was followed by an action to recover the possession. An appeal brought the controversy into the Court of Appeals. The power to enact the repealing statute of 1880 was claimed under the powers reserved by the act of 1856. The existence of such power was denied by the Court of Appeals. (The opinion of the court will be found in 79 Ky. Rep., commencing page 75.)

After disposing of several questions much pressed in

the argument, the court said: The Act of Incorporation embodied the terms of a contract, whereby, upon certain valuable considerations, the State leased its property to the Navigation Company. That up to 1880 the latter had complied with every stipulation required to be performed on its part. And without any other reason than the alleged power of the Legislature to disregard such contracts at its will and pleasure, the company was called on to surrender its control over these improvements and the benefits arising therefrom, without any compensation whatever. And then the court declared, that "the repeal of this part of the company's charter can not be held to have divested it of any of its rights or impair the validity of the contract under which these rights are asserted." (Page 81.)

The right of the State to assume the control of the line of navigation by the exercise of the power of eminent domain, and the payment of fair compensation was fully recognized, but the court added, "we can not consent to a doctrine that will allow the State to alter or abolish such contracts whenever, in the opinion of the Legislature, the necessities of the public or the the interests of the State require it." In its conclusion, on page 83, the court used this language: "The only question is, had the Legislature the power to annul the contract? We think not, and must adjudge that the act of the 8th of April, 1880, is unconstitutional and void.

The charter of the appellee has not been repealed, but only so much of it as relates to the lease, and if there had been a repeal of the charter by reason of the statute of 1856, the provision of the first section of that act, 'that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested,' would secure to the appellee its rights under the lease. The right of the appellee to the tolls and benefits of this line of navigation originated from the contract made with the State, and any legislation impairing its obligation without the consent of the appellee is a violation of the Constitution."

The provisions of the act of April 22, 1882, when accepted as a basis of action by the Water Company became a contract between the State and the company in the same way that the acceptance of the provisions of the act incorporating the Greeen & Barren River Navigation Company constituted a contract between the State and that company. And the prompt and continued performance of the statutory conditions of the act of 1882, by the Water Company, is equally meritorious with the execution of the bond for $500,000, and the expenditure of money by the navigation company in placing itself in condition to perform the duties imposed upon it by the statutory contract. And, in view of the fact that the Commissioners of the Sink-

ing Fund and the holders of the bonds of the city of Louisville have an interest in the continued execution of the contract of 1882, and may be deemed the beneficiaries of "other rights previously vested," this is, in that respect, a stronger case than that of the navigation company.

CONCLUSION.

It is submitted that if the Legislature can compel the Water Company to supply water to the fire department of the city of Louisville free of charge for the protection as well of the property of the State and Federal Goverment as of the city and its people, and cannot exempt the property of the company from State taxation, or can withdraw the exemption at will, then the State may, in this way and to this extent, legitimately diminish this resource of the Sinking Fund. And if after this service has been exacted, the State still preserves plenary power to tax the property of the Water Company, the Legislature may repeal so much of the act of 1882 as exempts that property from municipal and special taxation, and in that way still further diminish this valuable resource of that fund. So that, by one act of hostile legislation after another the value of that asset may be practically distroyed in the face of the legislative pledge, then the resources of the Sinking Fund shall not be diminished.

In these days of municipal extravagance, of popular hostility to corporate privileges and vested rights, and of decaying respect for the inviolability of public obligations, it is only necessary that the courts shall relax their efforts to maintain the integrity of legistative guarantees, in order to insure the virtual destruction of the Sinking Fund of the city of Louisville, and of all funds of like character set apart to secure the payment of the great volume of municipal indebtedness now in existence.

A reversal of the judgment of the Court of Appeals of Kentucky, with a mandate directing the affirmance of the judgment of the Louisville Law and Equity Court, is respectfully asked.

WM. LINDSAY,

Counsel for Defendants in Error.

THOS. L. BURNETT AND

WILLIAM LINDSAY,

Of Counsel.

For elucidation of the character and sanctity of Statutory Contracts in Kentucky special reference is made to the Bank Tax Cases, 87 Ky Rpts. 379-380-381

Also to

Orr v Bracken County

81 Ky Rpts 593.

Office Supreme Court U. S.
FILED,
OCT 19 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE LOUISVILLE WATER COMPANY, - Plaintiff in Error,

VERSUS

WILLIAM CLARK, - - - - Defendant in Error.

Sheriff of Jefferson County, Ky.

BRIEF FOR DEFENDANT IN ERROR.

JAMES P. HELM,
HELM BRUCE,
Counsel for Defendant in Error.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE

SUPREME COURT OF THE UNITED STATES.

LOUISVILLE WATER COMPANY, ... *Plaintiff in Error,*

VERSUS

WM. CLARK, SHERIFF OF JEFFERSON COUNTY, *Def't in Error.*

STATEMENT.

On October 1, 1887, the present plaintiff in error, the Louisville Water Company, filed a petition in the Louisville Law and Equity Court against Wm. Clark, Sheriff of Jefferson County, he being the collector of State taxes for that county, in which the plaintiff stated that the sheriff was about to levy on and sell its property for the payment of taxes claimed by him to be due to the State for the year 1887. The petition claimed that the property was exempt from taxation under an act approved April 22, 1882 (see appendix to this brief, p. 16), and further set up a variety of alleged irregularities and illegalities in the proceedings by which the property had been assessed for taxation. The prayer of the petition was that the sheriff be perpetually enjoined from collecting the tax, and that the property be adjudged not subject to the tax.

The defendant answered, denying specifically the allegations of the petition as to illegalities in the tax proceeding, and prayed that the plaintiff be compelled to pay into court the amount shown by the assessment against it to be due to the State for the year mentioned, and further prayed that, in the event it should fail to do so, the court appoint a receiver to take charge of the

affairs of the plaintiff until the said amounts should be collected and paid. (See printed Record, p. 11.)

None of the allegations of the petition as to irregularities and illegalities in the tax proceeding were proved; so the only questions became those as to the validity of the act of exemption of 1882, and as to whether or not that act had been repealed, and, if this had been attempted, then as to the power of the legislature to repeal it. The Law and Equity Court adjudged the exemption valid, and that there had been no attempt to repeal it, and granted a perpetual injunction against the collection of taxes from the plaintiff (Record, 13 to 27); whereupon the defendant took an appeal to the Court of Appeals of Kentucky. (Record, p. 30.) The Court of Appeals on October 9, 1890, reversed the judgment of the Louisville Law and Equity Court and held the act of exemption invalid, and directed the Chancellor to require the amount of the tax for the year 1887 to be paid into court by the plaintiff, and that in case of its failure to do so that the property be put into the hands of a receiver until the money should be paid. Plaintiff has now brought the case to this court by writ of error to the Court of Appeals.

In the Court of Appeals, in argument, we, as counsel for the sheriff, contended that the act of exemption of 1882 was invalid; and that, if valid, it had been repealed by the general revenue act of 1886; and that the legislature had the right and power to repeal the same. On the other hand, counsel for the Water Company contended that the act of exemption of 1882 was valid; and that the act of 1886 *did not repeal it;* and that even if it had so purported, still the legislature had no power to repeal it, because it constituted, as they claimed, a contract between the State and the Water Company.

The Court of Appeals of Kentucky expressed no opinion on the question of whether the act of 1886 did or did not repeal the act of 1882; but the majority of the court (three out of four of the judges) held that the act of 1882 attempted to exempt the property of the Water Company from taxation, not as a consideration for the Water Company's furnishing water to the city of Louisville for fire protection free of charge, but on the sole ground that it was the property of the city of Louisville. And this the majority of the court thought was not a valid ground of exemp-

tion. Judge Pryor, in his dissenting opinion, stated that he had no doubt that the inducement leading to the exemption was the fact that the city of Louisville owned the stock of the Louisville Water Company, but he differed from his associates as to the conclusion following from this premise, and was of the opinion that the exemption from taxation based on such an inducement was constitutional and valid.

In this court counsel for the Water Company will contend that the act of 1882 constituted a contract between the State and the Water Company; and, as we understand them, will contend further that the act of 1886 by its terms *attempted to repeal the act of* 1882; but that the legislature had no power to make such a repeal; and that this act of 1886 was an attempt on the part of the State of Kentucky to pass a law impairing the obligation of the contract created by the act of 1882; and that this court therefore has jurisdiction to inquire into the validity of the original contract and the right of the State to repeal the same, and that it should exercise this jurisdiction by holding the original act to be a valid and irrepealable contract. Thus the position of counsel for the company on the intent to repeal the act of 1882 by the act of 1886 is, as we understand it, *exactly the opposite of their position taken in the Court of Appeals on argument* (as shown by agreed facts heretofore filed herein); this change of opinion and change of position being made for the purpose of showing that this court has jurisdiction of the action.

We, as counsel for the sheriff, can not in this court reverse the position which we took in the Court of Appeals on the question of whether the act of 1886 was an attempt to repeal the act of 1882; but as the Court of Appeals expressed no opinion on that question, and as counsel for the Water Company most vigorously asserted that there had been no attempt to repeal the act of 1882 by the act of 1886, we must submit to this court, without argument on our part, the question of whether or not the act of 1886 was an attempt to repeal the act of 1882; but we shall contend that if it was an attempt to repeal the act of 1882 it was a valid attempt, for the legislature had the power to repeal it, which power was given by a general act of the legislature passed many years before the exemption was granted, and which must be considered as a part of the act of exemption. We shall fur-

ther contend that the act of 1882 *was not, either in form or substance, a contract,* but that it was simply an attempt to exempt the property therein referred to *on the sole ground that it belonged to the city of Louisville;* which ground we shall contend was not a valid ground of exemption, and that whether it was a valid ground or not, this court has no right or power to determine that question, because if the act was not a contract, then the ground of this court's jurisdiction is taken away. And we shall further contend that if the act of 1882 be considered as being in the form of a contract, and being intended to be a contract, still it was not valid.

Legislative History.

In order that the court may thoroughly comprehend the situation of all parties involved in this controversy we will now make a brief reference to certain acts of the legislature of Kentucky bearing on the question of furnishing water for cities, especially to Louisville, and also a reference to certain acts concerning the Sinking Fund of the city of Louisville, to which the stock of the Water Company belongs.

As it would occupy too great a space in the body of our brief to quote as fully as we should like from the legislative acts referred to, we have therefore annexed to this brief an appendix in which will be found the acts referred to, or such parts thereof as seemed to us material to the discussion.

By an act, approved February 15, 1838 (Acts, 1837–8, p. 206, appendix to this brief, p. 3), the Louisville Gas and Water Company was incorporated, and was authorized to erect gas-works within three years, and water-works within five years, after the passage of the act; *Provided,* That water-works should not be established until the citizens of Louisville should consent thereto. It was made the duty of this company to establish water-works of sufficient extent to supply the city of Louisville with water for the extinguishment of fires, for the cleansing and sprinkling of streets and alleys, and also to afford the citizens a sufficient supply for all manufacturing and domestic purposes. The corporation was given the exclusive privilege of establishing water-works, and was given the right to lay down and extend pipes

through any of the streets and alleys for the purpose of furnishing water to the city and its citizens. And it was further provided that the price of water to the city for the extinguishment of fires and for the cleansing and sprinkling of streets and alleys should be agreed upon annually by the city and the company. *Note the fact, that the city was to pay for the water it obtained, and that there was no provision for exempting the property of the corporation from taxation.*

No water-works, however, seem to have been constructed under this act.

By an act, approved January 31, 1842 (Acts, 1841–2, p. 141), the provisions of the act just noticed so far as they empowered the corporation to erect water-works were repealed, and the name of the corporation was changed to "The Louisville Gas Company;" and on the same day another act was passed (Acts, 1841–2, p. 139, appendix, p. 4), entitled "An Act to authorize and enable the City of Louisville to erect Water-works." By this act the city was *authorized* to erect water-works. It is to be noted, however, that the State offered no assistance to the city in this matter, but left the city to act solely for itself. No water-works, however, were erected under this act.

On February 29, 1848, an act was passed, entitled "An Act for the benefit of Common Schools in the Town of Portland, and for other purposes." (Acts, 1847–8, p. 405, appendix, p. 7.) By this act it was provided that it should be lawful for the city of Louisville to contract with the Louisville Gas Company upon such terms and conditions as the two corporations should mutually agree upon for the construction by the Louisville Gas Company of water-works for supplying the city and citizens of Louisville with water. *It is to be noted that there is still no offer of assistance from the State.*

By an act, approved March 24, 1851 (appendix, p. 7), a new charter was granted to the city of Louisville, by the 12th section of the 7th article of which it was provided that the General Council should have power by ordinance to establish, build, and erect water-works for the city of Louisville, but that no ordinance passed for such purpose should take effect until it had been approved by a majority of the votes of the qualified voters of the city, and all acts and parts of acts theretofore passed on the sub-

ject of water-works were repealed. By this act the subject of water-works is still treated as a strictly municipal matter, in which no one is interested but the citizens of the city of Louisville; and the State offers no assistance and attempts no control in the matter.

By an act, approved March 6, 1854, the charter of the present Louisville Water Company was granted, the title of the act being "An Act to Incorporate the Louisville Water Company." (2 Acts, 1853–54, p. 121, appendix, p. 7.) This act established the corporation, with power and authority to construct and establish water-works within the city of Louisville or elsewhere, for the purpose of supplying the city and its inhabitants with water. It gave the right to acquire and hold in fee-simple, or for a less estate, any lands necessary for the objects of the act. It also gave the power to acquire the right to lay pipes and aqueducts through any land that might be necessary for such purpose, and to condemn such land if it could not be acquired by contract. *It also gave the power to lay such pipes or aqueducts under or over any railroad, canal, highway, street, or wharf.* It further provided that in the laying and construction of the pipes and aqueducts in the city of Louisville the same should be so laid and constructed that an abundant supply of water could be drawn therefrom for the extinguishment of fires; *and provided that the corporation should furnish water to the city of Louisville for the extinguishment of fires and cleaning streets, upon such terms as might be agreed upon between it and the authorities of the city;* and that it should have the exclusive right to furnish water to the inhabitants of the city by means of pipes or aqueducts, if the authorities of the city should so agree, and upon such terms and for such time as might be agreed. It further provided that the price of water furnished by the company to the city should not exceed the average price charged in the cities of Pittsburgh, Cincinnati, and St. Louis.

Under this charter the water-works of the corporation which is the present plaintiff in error were constructed, its pipes and mains were laid through the streets and highways of the city of Louisville, all its property was acquired, and it began the furnishing of water to the city for the purpose of extinguishment of fires and cleaning streets and to the citizens of Louisville for

manufacturing and domestic purposes. *It is again to be noted that by this act there is no assistance on the part of the State either to the Water Company or to the city of Louisville.*

The act just mentioned provided that the water-works must be completed within three years, and fixed the capital stock of the corporation at ten thousand shares. An act, approved January 20, 1860, gave such additional time as might be necessary to complete the water-works.

An act, approved February 28, 1867 (2 Acts, 1867, p. 167, appendix, p. 10), increased the capital stock of the company fifteen thousand shares in addition to the stock previously authorized, and provided that the city of Louisville in its corporate capacity should have the power to take and subscribe for the said stock or any part thereof, and to pay for the same on such terms as the directors of the company and the city might agree.

An act was approved on March 9, 1867 (2 Acts, 1867, p. 417, appendix, p. 12), by which the "Commissioners of the Sinking Fund of the City of Louisville" was constituted a corporation for the purpose of taking charge of and managing the Sinking Fund of the city. It was of course a mere agency or assistant to the city; it had no assets except such as constituted the Sinking Fund of the city, and its officers were elected by the General Council of the city. It was given the power to invest any surplus funds it might have on hand in bonds of the city or of the State of Kentucky, or in such good and solvent stocks as should be approved by a vote of the majority of each Board elect of the General Council of the city.

On March 15, 1869, an act was passed, entitled "An Act to increase the Resources of the Sinking Fund of the City of Louisville," (2 Acts, 1869, p. 462, appendix, p. 14), by which it was provided that there should be added to the present resources of the Sinking Fund of said city the stock owned by it in the Louisville Water-works Company.

On March 3, 1870, an act was approved (appendix, p. 15) by which the present charter of the city of Louisville was granted. The 98th section of that charter provided as follows: "The water-works, *as an institution of the city*, shall remain as now established by law; but the General Council shall not take further

stock in the company without an ordinance first passed for that purpose."

This charter was amended by an act, approved March 3, 1871 (1 Acts, 1871, p. 323, appendix p. 15), by which it was provided that the Commissioners of the Sinking Fuud of the city should have power to purchase from the city of Louisville, or individuals holding the same, certificates of stock held by said city or said individuals in the Louisville Water Company; and that when so purchased, they should be held by said Commissioners as part of the Sinking Fund of said city; and that Section 98 of the charter first mentioned should be so amended as to authorize the city to pay the Water Company for all water furnished said city by said company, at the regular prices charged under the contract between the city and the Water Company, or under any contract that might thereafter be made, as if Section 98 of the said charter had not been enacted.

On March 21, 1871, just eighteen days after the passage of the act last mentioned, the legislature, being apparently doubtful as to whether or not the last act gave the Sinking Fund power to purchase stock in the Water Company which the city had purchased from individuals, passed another act giving such powers. (Appendix, p. 16.)

On March 22, 1882, an act, entitled "An Act to amend the Charter of the Louisville Water Company," was passed (2 Acts, 1881, p. 915, appendix, p. 16), which provided:

1. "That it shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire-plugs or hydrants of the city of Louisville for fire protection free of charge.

2. "The Sinking Fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said Water Company by virtue thereof is the property of the city of Louisville, *therefore* the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal, and special." (Our italics.)

At the time this act was passed the General Statutes of Kentucky (which were adopted in 1873) provided that it should be the duty of the President, Treasurer or Secretary of any Gas or Water Company in the State to report under oath to the Auditor

of Public Accounts, on or before the 10th day of July of every year, a complete statement of all property of said company, of every character and description, and the total cash value thereof; and that it should be the duty of such President, Treasurer or Secretary to pay into the treasury, on or before the 10th of October in each year, a tax on each $100 of value reported equivalent to the tax collected up on real estate. (General Statutes, Ch. 92, Art. 12, Secs. 4 and 5, appendix, p. 19.)

On April 22, 1884, this revenue law was amended so as to require the officers of all corporations, except railroad and turnpike companies, to list their property with the assessor of the county in which the property should be situated, instead of with the auditor as formerly required, and requiring the sheriff to collect the taxes instead of requiring them to be paid directly to the treasurer. (1 Acts, 1883–4, p. 70, appendix, p. 20.)

The general revenue laws of the State having been found to be in many respects deficient, an act was passed on May 17, 1886, providing a general revenue law; and this has now been embodied in the General Statutes as Chapter 92 in lieu of the former Chapter 92 heretofore referred to (appendix, p. 17). Of course this act or chapter provides generally for the levy and collection of taxes and the assessment of property, as is usual with such general revenue laws. And it contains a section, as did the former chapter, requiring the officers of gas or water companies in the State to report for taxation complete statements of the amount of their property and the total cash value thereof. (General Statutes, present Chapter 92, Art. 4, Sec. 3, appendix, p. 23.) The only difference between this provision and that contained in the former chapter, as it existed when the General Statutes were passed in 1873, being that the report of the property for taxation is made to the assessor, as had been required by the act of 1884, instead of to the auditor as first required.

ARGUMENT.

I

JURISDICTION.

The act of 1886 (present Chapter 92 of General Statutes) either was a repeal, or it was not a repeal of the exemption act of 1882. If it was a repeal of the act of 1882, or intended as such, then we shall consider, under the second head of our argument, the question of whether the State had the power to repeal it. But if it was not a repeal—and such was the contention of counsel for the Water Company before they came to this court—then manifestly this court has no jurisdiction of this action; because, if there has been no repeal of the act of exemption of 1882, then there has been no attempt on the part of the State of Kentucky to pass any law impairing the obligation of the alleged contract of 1882. It is true that the act of 1886 was a general revenue law, and repealed the previous general revenue law which had been passed in 1873, and in this sense it is true that any tax levied or collected subsequent to the year 1886 was levied and collected by virtue of the act of 1886, but this did not impair or in any way affect the obligation of the alleged contract of 1882, if it was not a repeal of the act of 1882. If the act of 1886 did not purport to repeal the act of 1882, then surely it can not be said that there has been any attempt on the part of the State to pass any law impairing that act; and consequently this court has no jurisdiction of the case. No question can be presented of the right to repeal that act if there has been no attempt to do so; and if there has been no attempt to repeal it, then it can not be said to be in any way affected or impaired by the subsequent act. If the act of 1882 granting the exemption was originally valid and the act of 1886 has not attempted to repeal it, then manifestly the act of 1886 has no reference whatever of any character to the act of 1882. And, on the other hand, if the act of exemption of 1882 was originally invalid, then the act of 1886 taxes the property of the Louisville Water Company, not by repealing or impairing in any way the act of 1882, but simply because the act of 1886 is a general act and embraces all the property in the State which is subject to taxation.

If the act of 1886, providing a new general revenue law of the State had not been passed, then the water-works, when it was determined that the act of 1882 was invalid, would have been taxed under the old general law of 1873; in this sense it might be said that the State court in upholding a tax under that law gave effect to an act that was inconsistent with the act of 1882 which is claimed to have created a contract. But of course no one would contend that the passage of the act of 1873 was on this account the passage of an act impairing the obligation of the contract of 1882. And yet the act of 1873, prior to the passage of the act of 1886, had just as much effect on the act of 1882 and the property therein sought to be exempted as had the act of 1886 when it was passed, provided of course this court thinks that the latter act was not intended as a repeal of the act of 1882.

Although the act of 1873, prior to the passage of the act of 1886, and the act of 1886, subsequent to its passage, both *affected the property referred to* in the act of 1882 (simply because they were both general taxing acts), yet neither of them affected the *act of* 1882 *itself*. The subsequent statute, if not a repeal of the act of 1882, did not affect it any more than did the prior statute, and if that act of 1882 is relied on as constituting a contract, and if that *act* is not affected by the act of 1886, then manifestly the obligation of the alleged contract is not affected.

Suppose for illustration that the act of 1886 had expressly declared that it should not be construed as repealing nor in anywise affecting the act of 1882. Surely it would not have been possible in such a case to hold, notwithstanding this plain declaration, that the act of 1886 did impair the obligation of the contract in the act of 1882. And yet if the Court of Appeals had held that the act of 1882 was invalid, it would necessarily in one sense have given effect to the act of 1886 in sustaining a tax levied under that act, because it is a general law taxing all property which is not lawfully exempt. It would give effect to it as a general taxing law, just as it would have given effect to a general tax law passed prior to the alleged contract, but it would not give effect to either as impairing the obligation of the contract of 1882. Now, of course, if by a proper construction of the act of 1886 it is found not to be a repeal of the act of 1882, its meaning and effect thus reached by construction is precisely the same as if it had expressly declared that it did not repeal the act of 1882.

Suppose still another illustration; suppose the act of 1886 had not been passed at the time the Court of Appeals was called on to pass upon the validity of the act of 1882; and suppose the court had held that the act of 1882 was invalid, and had therefore sustained a tax upon the water-works levied under the previous act of 1873; and suppose that this decision should be treated as the law of the State for ten, fifteen or twenty years after its rendition. But suppose that after the lapse of long years the State should then pass a general tax law similar to the law of 1886, could it be maintained with any degree of candor, after the passage of this new law, that jurisdiction was thereby given to this court by any action which might thereafter be brought by the Water Company to test again the right of the State to levy taxes upon it? Such an attempt would seem to be absurd, and yet if the passage of the act of 1886 has had the effect contended for, then the passage of any law changing the general revenue laws of the State at any time hereafter would have the same effect as is now claimed for the act of 1886, even though the act of 1882 might have been declared to be invalid long before the new act was passed.

It seems to us, therefore, too plain for further argument that if this court, upon a consideration of the act of 1886, agrees with the position taken by counsel for the Water Company before the case came to this court, and concludes that the act of 1886 was not an attempt to repeal the act of 1882, then there has been no attempt on the part of the State of Kentucky to pass any law impairing the obligation of any contract, and consequently this court has no jurisdiction to revise the judgment of the Court of Appeals; for of course this court is not given the jurisdiction to revise all judgments of the State courts on questions affecting the validity of contracts, but its jurisdiction is confined to cases where there has has been an attempt on the part of the State to *pass some law* impairing the obligation of a previous contract. (Lehigh Water Co. v. Easton, 121 U. S. 388.)

N. O. Water-works v. La. Sugar Co., 125 U. S. 30, is direct authority against the proposition that acts of *ministerial* officers could confer jurisdiction on this court.

As said above, we can not say that we do not believe the act of 1886 was intended as a repeal of the act of 1882, for we have

heretofore said just the contrary in the Court of Appeals of Kentucky, and we there contended for what we believed to be the truth. But as counsel for the Water Company before coming to this court vigorously contended *that the act of* 1886 *did not attempt to repeal the act of* 1882, and *as the Chancellor so decided*, and the Court of Appeals expressed no opinion on the question, but, as said by Chief Justice Holt in refusing the writ of error, did not consider the question at all, and as this court is bound to decide the question before taking jurisdiction, we deem it only fair that we should refer the court to the opinion of the Chancellor on this question (Record, p. 23), and should briefly state the grounds upon which counsel for the Water Company have heretofore always insisted that the act of 1886 did not repeal the act of 1882. These grounds are as follows:

1. The act of 1886 does not expressly repeal the act of 1882. On the contrary, it enumerates a number of acts by the date and title which are expressly repealed, but fails to mention the act of April 22, 1882; and the general words following the special enumeration are not sufficient to effect the repeal of the last named act.

2. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old. (16 Peters, 342; 30 Howard, 636; 11 Wallace, 88; 17 Wallace, 425.) The language of the exemption is special and express. The words relied on as a repeal are general and inconclusive, the rule is "*generalia, specialibus non derogam.*" (*Ex parte* Crow Dog, 109 U. S. 750; Cheu Hoong v. U. S., 112 U. S. 538.)

3. The general provision found in the third section of Article 1 of the act of 1886, as follows, "All property, real and personal, within this State *not herein expressly exempt by law*, shall be assessed, as nearly as practicable, according to a uniform rate, in the manner hereinafter provided," simply announces a general rule of constitutional law which would have been true even if the section had not been embraced in the statute.

4. The section just above quoted (Section 3) should not be so construed as to confine the exemptions contemplated to those expressly mentioned in the act of 1886, because it manifestly contemplates exemptions "by law" other than those expressly

named in the act, and the words "all property . . . not herein expressly *exempt by law* shall be assessed, etc.," should be read as follows: "*All property, not herein or by* law expressly exempt, shall be assessed, etc." To confine the exemptions to those expressly named in the act would be to make the words "by law" occurring in this section entirely superfluous and meaningless; whereas, "A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or *word* shall be superfluous, void, or insignificant." (Bacon's Abridgement, vol. 9, p. 239; Mocket Company v. Hoffman, 101 U. S. 115; Dazey v. Killam, 1 Duval, 404.)

5. The provisions of Article 4 of the act of 1886, with reference to the taxation of water companies generally, are simply a readoption of the provisions of the old act of 1873, changing the date as of which property had to be reported for taxation from July 10th to September 1st of each year, and changing the officer to whom the report was to be made from the auditor to the assessor, and were not intended as a repeal of the special exemption of the Louisville Water Company.

II.

Right of Repeal.

If this court concludes that the act of 1886 did attempt to repeal the act of 1882, then there arises, first, the question of the right of the State to make this repeal. We say this question arises first, because if the State had the right to repeal the act of 1882 and has exercised this right, then of course this ends the case. We shall therefore now consider the question of the right of the State to repeal the act of 1882; and we feel confident that we can show that the State did have the right to repeal the act of 1882, even if it be a contract, on account of a general statutory provision which must be considered as a part of the alleged contract, and which expressly reserves the right of repeal.

The act reserving the right of repeal in force in Kentucky at the date of the passage of the act of exemption, under which the right of contract is claimed in this case, is found in the General Statutes of Kentucky, Chapter 68, Sections 8 and 9. (See appendix,

p. 26.) The substance of this act has been in force since the 14th of February, 1856. It will be seen that the right was expressly reserved to amend or repeal, at the *will* of the legislature, all charters and grants of or to corporations or amendments thereof enacted or granted since the 14th of February, 1856, unless a contrary intent be therein *plainly expressed.*

It was a question under the language of the old act of 1856, whether the legislature retained control of an amendment adopted *after* 1856 to a charter or previous act granted or adopted *before* the act of 1856; but that question was settled in the affirmative by the Court of Appeals in the case of Hamilton v. Keeth, 5 Bush, 563, and when the old act was carried into the present revision of 1873, the language was so changed as to completely remove all further question. The act, as it now appears, expresses in plain language that which the old act was construed to declare, and there is now no doubt that an amendment passed after the adoption of the revision of 1873 to a charter or act existing prior to 1856 is subject to the control of the legislature unless a contrary intent be therein *plainly* EXPRESSED. The legislature did not intend that a contrary intent should be inferred from doubtful language, surrounding circumstances, the peculiar situation of the parties, nor for any reason or from any cause, but declared that the contrary intention, if such existed, should be "*plainly* EXPRESSED."

While subsequent legislatures had the power to declare that any grant or act adopted by them which constituted a valid contract should not be repealed, they will be presumed to have intended that such acts, charters, and grants, although they contained a contract, should remain subject to the control of the legislature unless a contrary intent was *plainly* EXPRESSED.

Long before the act of 1873 the Kentucky Court of Appeals, in the case of Griffin v. The Kentucky Insurance Co., 3 Bush, 592, and a number of other State courts of last resort, and this court in a number of cases had held that subsequent statutes not expressing a contrary intent should be read as if the reservation of the right of repeal had been therein expressly incorporated. The legislatures must be presumed to have understood the effect of these decisions, especially the decisions of the courts of their own State, and will therefore be presumed to have understood the

propriety and necessity of EXPRESSING their intention that the acts of their adoption should not be repealed, if they desired to remove contracts made by them from the control of subsequent legislatures; and their failure to EXPRESS such an intent should be taken as conclusive evidence of their desire to leave such acts, grants, or charters adopted by them subject to the provisions of the general reservation law.

DECISIONS ON THE EFFECT OF RESERVATION STATUTES.

There are of course a great many decisions of State courts and United States Circuit Courts on this question, but we think it would be an inexcusable waste of this court's time to do more than to refer to the decisions of the Kentucky Court of Appeals, and to some of the decisions of this court.

GRIFFIN V. KENTUCKY INSURANCE CO., 3 BUSH, 592.

This is the leading case in Kentucky on that subject. In discussing the statute the court said:

"That statute in its prospective operation is constitutional, and therefore a law of the State; and, as it has never been repealed, it applies to the charter of 'The Kentucky Insurance Company,' unless, as argued, the non-reservation in the charter itself of power to amend or repeal it implied a repeal, as to it, of the general statute. But there being nothing in the language of the charter importing any such intention, if the mere pretermission of special reservation of the power to amend or repeal should be construed as a negation of the power, the statute of 1856 would be superfluous and inoperative; because, in relation to charters reserving the power, there was no necessity for that enactment, which therefore was intended to operate only on charters which do not reserve the power already reserved by statute.

"Then, was this general reservation of power, like a special reservation in the charter itself, a part of the contract; or was the contract made subject to it, and the obligation defined or modified by it? We think so. And, whatever might be thought of the policy of such legislation, or of the policy or justice of the repealing statute over which the judiciary has no jurisdiction, our conclusion as to the mere power of repeal is, as we think, sustained by reason and abundant authority."

TOMLINSON v. JESSUP, 15 WALLACE, 457.

The railroad company in this case was expressly exempted from taxation during the continuance of its charter. At the date of the passage of this exempting statute, however, there was a general law in the State of South Carolina reserving the right of repeal, and the exempting statute contained no clause excepting it from the operation of the general law. The court, in discussing this question, said:

"It is true that the charter of the company when accepted by the corporation constituted a contract between them and the State, and that the amendment when accepted formed a part of the contract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations can not be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation and of similar reservations in other charters is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interferences. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation.

"There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. . . .

"Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State."

This case was referred to with approval in the case of Union Pacific Railroad Company v. The United States. (Sinking Fund Cases, 99 U. S. 720.)

RAILROAD v. MAINE, 96 U. S. 507.

The Maine Central Railroad Company was originally formed in October, 1862, by the consolidation of two other companies whose charters were granted in 1845. The charters of these constituent companies had clauses of taxation precisely the same, and the charter declared that no other tax should be levied or assessed on the corporation or any of its privileges or franchises, and that the charter should not be revoked, annulled, altered, limited, or restrained without the consent of the corporation except by due process of law. The consolidation took effect under an act passed in 1856, which provided that the new corporation should have all the powers, privileges, and immunities possessed by each of the corporations entering into the agreement. Some years after this consolidation, by a law passed in 1873, three other railroad companies, whose roads were at that time under lease to the Maine Central, were allowed to consolidate with it upon the same terms and conditions prescribed by the act of 1856. The second consolidation took effect in 1874. It was upon the franchise of the Maine Central Railroad Company, as formed by the consolidation in 1874, that the tax was assessed and levied for which the action was brought. An act of the legislature of Maine, passed in 1831, declares that all acts of incorporation which shall be passed after the passage of this act shall at all times hereafter be liable to be amended, altered, or repealed at the pleasure of the legislature in the same manner as if an express provision to that effect was therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary. Judgment was rendered in favor of the State, and the company sued out the writ of error. This court, through Mr. Justice Field, sustained the assessment and affirmed the judgment of the State court. The court held that by the consolidation in 1874 the company's charter became subject to the act of 1831 above quoted. In discussing the question the court said:

"There was no limitation in the act authorizing the consolidation, which was the act of incorporation of the new company upon the legislative power of amendment and alteration, and of course there was none upon the extent or mode of taxation which might be subsequently adopted. By the reservation in the law of 1831, which is to be considered as if *embodied in that act*, the State retained the power to alter it in all principles constituting the grant to the new company formed under it of corporate rights, privileges, and immunities. The existence of the corporation and its franchises and immunities derived directly from the State were thus kept under its control." (Our italics.)

ATLANTIC, &C., RAILROAD CO. v. GEORGIA, 98 U. S. 365.

The facts of this case were almost exactly the same as in the case last cited with a similar result, and the court in this case expressly approved the decision in the Maine case.

HOGE v. THE RAILROAD CO., 99 U. S. 354.

The railroad company was expressly exempted from taxation for thirty-six years. At the date of this exempting statute there was a general law in force reserving the right of repeal. The road was under a subsequent statute taxed, the court sustained the tax, holding that the charter should be read as if it declared that the road should be exempt for thirty-six years unless the exemption was in the mean time withdrawn by the legislature.

GREENWOOD v. THE FREIGHT CO., 105 U. S. 14.

The Marginal Freight Company was organized under an act of the legislature of Massachusetts of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws which now or may hereafter be enforced relating to street railroad corporations so far as they are applicable. The right of way of this company, for part of its route, lay over the line of railroad previously granted to the Commercial Freight Railroad Company, and the Marginal Company, by virtue of the provision in

its charter, purchased and paid the Commercial Company for the joint use of its track so far as it ran through the same streets. Afterwards, on May 6, 1872, the legislature of Massachusetts incorporated, by an act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the Board of Aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of the track of that or any other street railroad company on payment of compensation. This latter act repealed the charter of the Marginal Company. It was contended that this violated the contract of the Marginal Company.

The bill averred that the Union Freight Railway Company had been organized, and was about to proceed in such a manner under the act that the Marginal Company would be utterly destroyed and its several contracts, franchises, rights, easements, and properties would be impaired and destroyed. The prayer of the bill was for an injunction against the defendants to prevent these acts so injurious to the rights of the Marginal Freight Railway Company. To this bill the demurrer was interposed. Several questions were presented and decided.

It was contended by the counsel for the complainant that the repeal of the Marginal Company and the authority vested in the Union Company, when taken together, constituted a transfer of the property of one corporation to the other, and with all the corporate franchises, rights, and privileges, belonging to the elder corporation. The court expressed itself as not being insensible to the force of the argument, and conceded that, according to the unvarying decisions of this court, the unconditional repeal of the chacter of the Marginal Company was void, under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it was made valid by that provision of the General Statutes of Massachusetts called the reservation clause concerning acts of incorporation.

The reservation act of Massachusetts is in these words:

"Every act of incorporation passed after the 11th day of

March in the year 1831 shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature."

This language does not vary in substance from the statute of Kentucky heretofore quoted, but this court in commenting on the language declares that it would be difficult to supply language more comprehensive or expressive. It said:

"The validity of such action (referring to the repealing act) does not depend on the necessity for it or on the soundness of the reasons which prompt it. This expression, the 'pleasure' of the legislature is significant, and is not found in many of the similar statutes in other States."

In the statute of Kentucky the word "will" is substituted for "pleasure," which the court will see in a moment has just as wide and comprehensive a meaning. This court, proceeding, said:

"This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we can not doubt the authority of the legislature of Massachusetts to repeal that charter."

It was argued that the act should be examined as a whole, and as the early sections of the statute bestowed upon the Union Company the right to seize the tracks and other property of the Marginal Company, this repealing clause was inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another. But this court declined to consider the reasons which influenced the legislature, saying: "For the exercise of this power is by express terms to be at the 'pleasure' of the legislature." The decision in this case has lately been expressly approved in the cases of Denny v. Bennett, 128 U. S. 495, and Gibbs v. Baltimore, &c., 130 U. S. 408.

SPRING VALLEY WATER-WORKS CO. v. SCHOTTLIN, 110 U. S. 348.

The Constitution of California, adopted in 1849, declared that all general and special acts thereafter adopted might be altered

from time to time or repealed. The Spring Valley Water-works Company was organized under an act of 1858, as amended by an act of 1861. By a provision of the last named act, it was declared that all water companies claiming any of the privileges of the act should furnish pure and fresh water to the towns and cities which they were organized to supply, with the provision for the election of commissioners to fix the water rates. Two of these were to be selected by the water company, two by the city or town, and the fifth by these four. In the event the four could not agree, then the sheriff was to appoint the fifth, and the board as thus constituted was empowered to fix the water rates. After a board had been thus constituted one of the members died, and the vacancy caused by his death was never filled. In the mean time, however, in 1879, a new constitution was adopted by the people of California. By one of its provisions the method of selecting the water commissioners was changed, the water company was denied any voice in this selection, and the cities or towns furnished with water were given the exclusive right to name the commissioners who fixed the rates. It was contended that this was a violation of the contract contained in the previous provision referred to. It was contended also that it amounted to a virtual confiscation of the property of the water company, by giving the people who were to pay for the water, or their representatives, very largely subject to their domination and control, the right to fix the water rates which were to be paid for by themselves, and it was contended that this was making the commissioners judges in their own cases. It was claimed that the water company had expended very large sums of money on the faith of the alleged contract, that its aqueducts, reservoirs, pipes, and the water collected by it as it fell from the clouds was its own property, which it did not derive from the State, but in the exercise of legitimate powers granted by the State before the adoption of the obnoxious legislation. But this court sustained the legislation thus vigorously assailed, not only by the learned counsel who represented the water company but by a most able and learned opinion on the part of Mr. Justice Field. This decision was expressly approved in Gibbs v. Baltimore, &c., 130 U. S. 408, and Sioux City, &c. Railroad Co. v. Sioux City, 138 U. S. 473.

LOUISVILLE GAS CO. v. CITIZENS GAS LIGHT CO., 115 U. S. 696.

The reservation statute of Kentucky, or rather the statute which preceded it, the one known in our State as the Statute of 1856, has been expressly construed by this court in a very able opinion delivered by Mr. Justice Harlan in the case of the Louisville Gas Company v. The Citizens Gas Light Company, 115 U. S. 696.

The court said with reference to this statute:

"The language of this statute is too plain to need interpretation. It formed a part of the charter of the new Louisville Gas Company when incorporated in 1867, and the right of the legislature by a subsequent act passed in 1872 to incorporate another gas company to manufacture and distribute gas in Louisville, by means of pipes laid at its own cost in the public ways of that city, so far from impairing the obligation of defendant's contract with the State was authorized by its reserve power of amendment or repeal, unless it be that the act of January 2, 1868, 'plainly expressed' the intent that the charter of the new Louisville Gas Company should not be subject to amendment or repeal at the mere will of the legislature."

This decision was approved in Lehigh Water Co. v. Easton, 121 U. S. 388.

The counsel for the plaintiff in error in their last brief quoted from the dissenting opinion of Mr. Justice Field in the Spring Valley Water-works case, but we think they misunderstood the meaning and effect of the opinion. They quoted it to show that an immunity from taxation derived solely from the State could be treated as other property not acquired from the State, whereas no such idea was ever intended to be conveyed by the opinion. The learned Justice was not denying the right of the State to repeal or alter a franchise or immunity granted by the State, but was insisting that the effect of the subsequent legislation was to give to the people who had to pay for it the power to say how much they must pay, and that this was a virtual taking of the property, such as aqueducts, reservoirs, pipes, and the water itself from the company, and that none of these things were derived from the State, but in the legitimate exercise of powers granted by the State.

We think, if the principles announced in the dissenting opinion should be applied to this case, that it will still be perfectly plain that the judgment of the Court of Appeals should be affirmed.

The counsel also relied on the case of Louisville, &c. v. The Commonwealth, 10 Bush, 47; but an examination of that opinion will show that the charters involved were granted *before* the act of 1856, and that the court for that express reason declined to consider the act of 1856, but held that no contract existed and sustained the legislation complained of. They also relied upon the case of Covington v. Covington, 10 Bush, 76. Here again the charter was granted prior to 1856 and the effect of the act was not considered, but here again the amendment assailed as impairing the obligation of the contract was sustained by the court.

The counsel also relied with great confidence upon the case of The Commissioners Sinking Fund v. Green & Barren Navigation Co., 79 Ky. 75.

This case when properly understood is easily distinguishable from the other Kentucky cases. The sections of the act upon which this opinion is based will be found in the appendix at page 24. The State had very expensive and valuable property on the line of Green River, but for years it had been constantly brought in debt in its control and maintenance of the navigation of those waters; accordingly an act was passed which in effect conveyed this valuable property for the term of thirty years to the Green & Barren Navigation Co.; and that company was required to undertake and discharge certain duties, and were granted certain privileges in connection with the duties imposed and the property conveyed. And the company was required to enter into a covenant with the State in the penal sum of $500,000 with such surety as might be approved by the Governor for the faithful performance of its part of the contract. The company invested very large sums of money on the faith of its contract; and after that the State undertook, not to repeal the charter of the corporation, but simply to annul the contract thus formally entered into. The effect of that would have been to have confiscated the property of the Navigation Company. That act was not the mere exercise of legislative powers, like granting privileges,

ARTICLE IV.

Turnpike Roads and Other Corporations.

Sec. 3. It shall be the duty of the president, treasurer, or secretary of any gas or water company or association in this State, to report, under oath, to the assessor, on or before the fifteenth day of September in each year, as of that date, a full and complete statement of all property, real, personal, or mixed, including buildings, engines, machinery, pipes above and below ground, reservoirs, retorts, tanks, meters, lamp-posts, together with any and all species of property connected with or in any way belonging to or under the control of such gas or water company, and any surplus or accumulated or contingent fund on hand, cash on hand, stocks, bonds, or other securities, and the total cash value thereof.

ARTICLE XII.

Bonds, Penalties, and Blanks.

Sec. 5. Chapter 92 of the General Statutes, the act of March 28, 1872, entitled "An Act to Amend Chapter 83 of the Revised Statutes, titled 'Revenue and Taxation,'" the amendment to said act of March 28, 1872, entitled "An Act to Amend an Act, approved March 28, 1872, authorizing Sheriffs to sell Real Estate to pay Revenue Tax," approved April 19, 1873, the act approved April 2, 1878, title "An Act to Amend Section 6, Article 6, Chapter 92 of the General Statutes, title 'Revenue and Taxation,'" approved May 8, 1884, and all other acts, general and special, and parts of acts inconsistent herewith, or not in conformity herewith, are hereby repealed; but nothing in this act shall interfere with any existing local option, or any special or prohibition law in any county, nor with any local or general law for creating or collecting county levy, or with Chapter 1315 of the Acts of 1879–80 (a), or with an act entitled "An Act for the Benefit of the Branch Penitentiary at Eddyville," approved April 7, 1886.

Sec. 6. Nothing in this act shall be held to repeal or in any way impair the force and effect of any local or special act, or

any general law now in force, or that may hereafter be passed, providing for the appointment of collectors of State revenue or county levy and poll tax in any county of the State, nor shall any thing herein be construed to repeal or impair the force of any special or local law giving to counties or towns, for road or street purposes, the fines collected for violation of the road and bridge laws of said county.

SEC. 7. That this act shall take effect from and after September 14, 1886; but it shall not operate as a repeal of existing laws as to any assessment made, licenses granted, or obligations or penalties incurred under any existing law.

An Act to incorporate the Green and Barren River Navigation Company. Approved March 9, 1868. (2 Acts, 1867–8, p. 599.)

Whereas, The Green and Barren river line of navigation has always been a charge upon the State, and is now largely in debt and without prospect of any better condition; and whereas, it is of great importance to the country to keep said line in working order, and at the same time to avoid any public expense if possible, and believing that object can be accomplished by letting it to an incorporated company, . . .

SEC. 2. That the said Green and Barren river line of navigation and their tributaries, together with the grounds, houses, water-works, rents, profits, tools, machinery, implements, and appurtenances, and all the franchises thereunto belonging or appertaining, be and the same are hereby loaned and conveyed unto the corporators named in the first section of this act, and to their associates, successors, executors, heirs, and assigns, for and during the term of thirty years from and after the time they get possession thereof; and it shall be the duty of the Governor of this Commonwealth to cause possession thereof to be delivered unto them as soon after the passage of this act as they, or any of them who may choose to accept, may give notice of readiness to receive it, upon their complying with all the conditions precedent herein provided.

SEC. 3. The business of the company may be to use and suffer to be used said line of navigation for all the purposes of navigation, and also the water-power, property, rights, appurtenances, and all the franchises thereunto belonging as they may direct, not inconsistent with the purposes of said line as expressed by law; and, as an auxiliary to said business, and to facilitate commerce and trade, and to develop the resources of wealth along said line, it may also be their business to open and work coal mines and other mines, and to deal in the products thereof, as also in the products of the country and other things, as well as in the work of machinery and navigation on said line. They may also lease, buy, sell, hold, and otherwise require and dispose of any real and personal estate, by any manner not prohibited by law, the same as a natural person; and may do all necessary or advantageous acts in the same way, in the transaction of their business, not inconsistent with the constitution of this State or of the United States.

SEC. 11. It shall be the duty of the company, or such of them as may choose to accept the provisions of this charter, together with their associates whom they may choose to associate with them, to execute their bond to the Commonwealth of Kentucky, with security, the solvency of which to be approved by the Governor of said Commonwealth, and be attested by him under the seal of his office, which bond shall be in duplicate, one copy to be retained by the State and the other by the company. The conditions of the bond shall be as follows: "In consideration of the undisturbed possession of the Green and Barren river line of navigation and its tributaries, together with its grounds, houses, water-powers, rents, profits, tools, machinery, implements, appurtenances, and all its franchises thereunto belonging or appertaining, now to be delivered to us, the undersigned, to hold for thirty years, under an act of the legislature incorporating the Green and Barren River Navigation Company, we accept the same; and as a company aforesaid are bound hereby in the penal sum of five hundred thousand dollars to perform the duties and obligations imposed by said act of the legislature, and to return the same same in good order as set out in said act, subject to the conditions therein expressed. Given under our hands and corporate seal of said company, this day of 18 Which

bond being executed by the parties aforesaid, and approved as aforesaid, and attested by the Governor, shall entitle the company and their associates to all the rights conferred by this act: *Provided, however,* That said company may associate others with them before or after the execution of said bond: *And provided further,* That the Commonwealth shall have a lien upon all the property of said company to secure a compliance with the stipulations of said bond.

Approved March 9, 1868.

Reservation Statute.

Sec. 8. All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided,* That, whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

Sec. 9. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property and all debts payable to it shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before for the purpose of settlement and distribution as aforesaid. (General Statutes of Kentucky, Ch. 68, secs. 8 and 9.)

franchises, and immunities, but it was the formal execution of a contract by which the State conveyed certain properties for a certain length of time for a valuable consideration to the corporation, and it may be very well doubted whether the State possessed any more right by annulling that contract to take back its property thus conveyed than it would have had to seize again on any other real estate formally patented, granted or conveyed to any citizen of the State.

It may be contended that the case of New Jersey v. Yard, 95 U. S. 104, is inconsistent with the position for which we contend. If such should be the contention, we might very well note the fact that the decisions which so palpably sustain the position for which we contend are, most of them, subsequent to the decision in the Yard case, and therefore of controlling force; but we do not think there is any inconsistency between that case and the ones which we have cited when the facts of the Yard case are well understood.

The right of repeal was claimed in that case, first, because the power was reserved in the charter and the first supplement of the charter in express words, and second, because of the language of a general act adopted prior to the passage of the act which contained the contract. Upon the first question it will be noticed that the original act by its terms reserved the power simply to amend, repeal, or alter that act, and the first supplement, with equally restricted language, reserved the right to alter or amend or repeal that supplement and the act to which it was a supplement, and the court declined to extend that language to apply to subsequent enactments. With reference to the general law of the State it will be noticed that there was no provision, as in this case, to the effect that the contrary intention must be "*plainly* EXPRESSED," but it simply declared that the charter of every corporation which should thereafter be granted should be subject to repeal. The court was thus left free to arrive at the intention of the legislature by the ordinary and recognized canons of construction. Being thus free, the court noticed the fact that the act of exemption declared that the tax thereby imposed "should be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this State or any law thereof, and the court, through Mr.

Justice Miller, argued with great force, considering the nature of that language, and the fact that the State required of the railroad company to accept the contract within sixty days, and considering the fact that this contract had been formerly accepted within the time named, and when so accepted was in settlement of a controversy then existing between the State and the railroad company with regard to the right to impose taxes on the company, that it could not have been the intention of the legislature to go through with all this formality to last for a single day, and that the language did clearly import an intention that the contract should be inviolable.

In the case at bar, as we show in other parts of this brief, there was not the semblance of formality nor any appearance of a contract. The legislature in the exercise of its legitimate function simply granted a mere gratuity to the city of Louisville, an agency of the State; the act reciting that the Water Company was practically the property of the city, and *therefore* was exempted from taxation. The nature or character of this grant could not by any possibility be changed or affected by any action which the Water Company might take. It is not pretended that the Water Company went to one single cent of expense in order to enable itself to comply with the provisions of this act. Such a contention could not be truthfully made, for it is clearly shown by the acts which we publish in our appendix that the company already had imposed upon it, and had undertaken, the burden of furnishing water to the city for fire protection, and indeed every other duty exactly as it is now performing it, and received its pay therefor from the city of Louisville. The effect of the exempting statute, giving it the greatest effect contended for, is simply to say to the city that in the future the State will pay and relieve the city from the payment. The Water Company, however, is not affected, because it can not make any difference to it whether it receives its pay from the State or from the city. Viewed in this light the grant was a mere gratuity to the city, which was subject to be withdrawn at any time at the will of the legislature whether the power had been reserved or not. If the State withdraws its agreement to pay the Water Company for water furnished to the city by exempting the property from taxation, then the city becomes liable to the Water

Company just as it was before, and it seems to us to be quite unreasonable to contend, in any state of case, that the Water Company would remain bound to go on furnishing to the city water for fire protection free of charge, if it be true, as contended, that the consideration for this was the exemption of its property from taxation.

The counsel in their arguments heretofore seem to have wholly misunderstood the effect of the proviso in the reservation statute, "that, whilst privileges and franchises so [illegible] may be changed or repealed, no amendment or repeal shall impair *other* rights previously vested." It seems to be contended that after a privilege, franchise or immunity granted by the State has been acted upon by the person or corporation to whom the grant is made, that it is then too late for the State to withdraw such privilege, franchise or immunity; and it seems to be contended that in such a case these privileges, franchises or immunities come under the designation of "other rights."

How such a construction can be indulged, in view of the great light which has been thrown upon these reservation statutes by a number of learned opinions, seems to us incomprehensible; but that is nevertheless the substance of the contention of counsel for the plaintiff in error.

The effect of the reservation statute, we confidently submit, would be precisely the same whether that proviso was in or out. If the proviso was entirely omitted, the State would have no right to take from a person or corporation any property which it had legitimately acquired, nor deprive it of any rights not granted by the State, but derived under the legitimate exercise of the powers of the individual or corporation.

These are the "other rights" referred to in the Kentucky statutes. The reservation of the right of repeal made necessary by the decision in the Dartmouth College case was simply a reservation of power to control corporate franchises, privileges, and immunities *granted by the State.* Such a ~~grant of reservation~~ can not possibly apply to any thing which the State never possessed and therefore never granted. Such statutes leave to corporations their business and property exactly where they would have been had the Supreme Court held in the Dartmouth College case that charters were not contracts within the

constitutional prohibition against legislative impairment. If the rule had always been precisely the reverse of what it was announced to be in the Dartmouth case, there never would have been any reservation statutes, and no one would have contended that the State would have the power to take from a citizen property or property rights without proceeding in the exercise of constitutional powers to condemn and making just compensation for the property taken. We repeat, therefore, that this proviso in the Kentucky statute was simply in recognition of a principle well known, that the State had no control over these other rights and privileges vested in its citizens or corporations.

The act of exemption of the Louisville Water Company does not contain the slightest intimation that it was the purpose of the legislature to place the grant of the immunity beyond legislative control. It is entirely silent on that subject; it should therefore be read as if the reservation was expressly inserted in the act. Remembering this, let us look at the statute which it is now claimed is beyond the power of the legislature, and in quoting it we shall insert a third section in italics, in which we shall state the effect of the general law as this court and the Court of Appeals and numerous other courts have said should be done:

"SEC. 1. That it shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire-plugs or hydrants of the city of Louisville for fire protection free of charge.

"SEC. 2. The Sinking Fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and the Water Company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted from the payment of all taxes of all kinds of whatever character, State, municipal, and special.

"SEC. 3. *This statute shall be subject to amendment or repeal at the will of the legislature.*

"SEC. 4. This act shall take effect from and after its passage."

Looking at this statute as here written, it seems incomprehensible how any argument can be advanced to prove that the power of repeal expressly reserved can not be exercised; and when we remember the circumstances and the reasons given by the legislature for its action, the declared principles upon which it acted,

we feel that we should not be easily excused if we further protracted this part of the argument. We insist, therefore, that if this court should take jurisdiction of the case, which it can only do by holding that the act of 1886 repealed the act of 1882, it must inevitably hold that the repealing statute was clearly within the power of the legislature.

III.

THE ACT OF [redacted] WAS NOT A CONTRACT.

But if the court should disagree with us on the question of the right of repeal, and should hold that the State had no right to repeal the act of 1882 if a contract, then we propose to show the court, as we feel confident we can do, that the act of 1882 *was not a contract* either in form or in substance; and that, if in the form of a contract and intended as a contract, it was not a valid contract.

We propose now, under the present heading of our argument, to consider the proposition of whether the act of 1882 was in form or substance a contract.

Two constructions of the terms of this act, as showing the meaning of the legislature and the inducement which moved it to grant the exemption, have been contended for.

Counsel for the Water Company contend that it is simply a contract between the State and the Louisville Water Company as a private corporation, whereby the State, recognizing its duty to furnish water for fire protection to the city free of charge, agreed with the Water Company that if it would furnish this to the city free of charge the State would release it from the payment of taxes.

We, as counsel for the sheriff, contend that the act is simply an attempt on the part of the legislature to exempt the property *because it belonged to the city of Louisville.*

The question, which of these two constructions is correct, is of course very important. If the first is correct, then the act is at least in the form of a contract, and the serious questions will become those as to its validity and the question heretofore discussed as to the right of repeal. But if the second construc-

tion, or in other words, our construction, is correct, then manifestly there is no contract, and this court has no jurisdiction to determine the question of the right of the State to grant an exemption to the property simply because it belongs to a municipality.

We do not see how there can be any doubt as to the view which the legislature took of the situation, nor as to what the terms of the act itself show to have been the reason which influenced the grant of exemption. For the convenience of the court we will repeat the terms of the act. It is as follows:

1. "That it shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire-plugs or hydrants of the city of Louisville for fire protection free of charge.

2. "The Sinking Fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said Water Company by virtue thereof is the property of the city of Louisville, *therefore* the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal, and special." (Our italics.)

Thus, in the second section of the act wherein the exemption is granted, the legislature in express terms declares that the reason of the exemption is the fact that the property belonged to the city of Louisville. Counsel contend that because the first section directs the Water Company to furnish water for fire protection to the city of Louisville free of charge, therefore that must have been the consideration. They contend in effect that we must simply put together the two facts of furnishing water for fire protection, as required by the first section of the act, and the exemption from taxation, as granted by the second section, and must treat the one as the consideration of the other, and as thus showing an intent to form a contract, with mutual obligations between the State and the Water Company, regardless of the reasons which the State has expressly given for its action, and which clearly show that it did not consider that it was forming a contract with the Water Company as a private corporation, but that it exempted it simply because it was understood to belong to the city of Louisville.

The direction to the Water Company to furnish water to the

city for fire protection free of charge, as required by the first section, so far from supporting the idea of a contract confirms the other view of the act. The language of the act is not the language of a contract nor of a proposition for a contract, but is language which shows that the State regarded the property of the Water Company merely as the property of the city of Louisville, and regarded the payment by the city to the Water Company as a mere payment by the city to itself for the use of its own property, though it was a payment out of the general fund into the Sinking Fund of the city, and therefore directed that this transfer of funds from one department to the other should cease, inasmuch as by the same act the funds of the Sinking Fund were greatly increased by an exemption of three or four million dollars worth of its property from taxation (the legislature supposing of course that the act of exemption was valid), the idea being to preserve to some extent the equilibrium between the two funds.

It seems, therefore, very clear, not only only from the second section of the act, but also from the first and second sections taken together, that the legislature of the State in passing this act had no idea of making a contract with the Water Company, but that it regarded the Water Company as itself the property of the city of Louisville, and considered that it was on that account alone a proper subject of exemption from taxation.

The fact that this was at least the view taken of the matter by the legislature is further supported by the fact, that in granting the present charter of the city the Water Company was spoken of, as heretofore shown herein, as "an institution of the city;" and although this part of the charter was subsequently repealed and provision made that the city should pay the Water Company for water supplied by the latter, this was evidently for the purpose of maintaining the assets of the Sinking Fund of the city, the amendment being passed, not for the benefit of the Water Company, but solely for the purpose of preventing a decrease in the assets of the Sinking Fund which it was considered proper to keep up.

We further call attention in this connection to the history of this matter as we have given it at considerable length in our statement of the facts, and which shows clearly that the State *has never*

regarded itself as under obligation to furnish water to the city of Louisville free of charge; but from the earliest acts of the legislature on that subject, going back as far as the year 1838, forty-eight years before the passage of the act of 1882, has always treated the matter as one of entirely municipal concern, and has never evinced the slightest intention to render State aid to the city of Louisville in procuring or maintaining water-works; although, if there was ever a time when assistance ought to have been given, it was when the institution was in its infancy, and when the city was far less able to pay for the erection of water-works or for the supply of water than it was in 1882. We do not think this legislative history should be slightly passed over, for it seems to us it should have a controlling influence in interpreting the act of 1882 as to what was intended by the State in passing that act.

It may possibly be contended that on account of the claims of the *creditors* of the Sinking Fund the State had no right to order the city to cease paying out of its general fund to its Sinking Fund, even though at the same time it exempted a large amount of the property of the Sinking Fund from taxation. But the conclusive answers to this objection from the Water Company are, first, that the State certainly had as much right to *command* this change as it had to *contract for it without the consent of the creditors of the Sinking Fund;* and it is not pretended that these creditors were parties to the alleged contract between the State and the Water Company which is now being insisted on; and second, that the creditors are not parties to the suit or complaining, and, if they were, they have no lien on the resources of the Sinking Fund. The Sinking Fund itself is but a part of the city—an agency of the city—and the city has no interest in point one way or the other, as we shall presently show.

Now, although we will presently show that this *could not* have been a contract under the facts that actually existed when it was passed, yet before reaching that point, have we not shown that it *was not* a contract, when we have shown, as we have just attempted to do, that the legislature *did not so intend?*

In New Jersey v. Yard, 95 U. S. 114, this court, through Justice Miller, in speaking of legislative acts that were claimed to be contracts, said:

"The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the State and other parties when the terms of the statute have been accepted and acted upon by those parties. This has always been a very nice point; and when the supposed contract exists only in the form of a general statute doubts still recur after all our decisions on that class of questions."

Now, when the legislature shows clearly by its language that it is simply attempting to exercise a supposed power of exemption from taxation on the ground that the property exempted belongs to a city, and further, in the language of command, directs that certain services shall be performed for this city by a corporation which it states to be the property of the city, can this corporation obey the command and then insist that it is a mere private corporation, and that it has treated this act as a proposition for a contract and has accepted it? We think it clear that this can not be done; and as the act on its face showed clearly that it was intended as a command, in the exercise of a supposed right of command, and not as a contract or agreement, the Water Company had and has no right to treat it otherwise.

Furthermore, the ground on which it is held that the consideration for the grant of an exclusive privilege by the legislature will be held *adequate* by the courts, if it is *valid*, is that the *legislative judgment* having acted on a matter within the legislative province, this judgment will be held *conclusive* on the question of the adequacy of the consideration. (Gordon v. Winchester Building Association, 12 Bush, 114, cited with approval in Louisville Gas Company v. Citizens Gas Company, 115 U. S. 694.) Therefore, when it affirmatively appears on the face of an act that the legislature has granted an exemption from taxation *on one particular specified ground*, and on no other, we do not see how any other can be treated as having been considered or as having been adjudged sufficient by the legislative judgment or as having formed the basis of any agreement between the State and a third party. When no consideration for the exemption is expressed, the courts will uphold it if *any* valid consideration can be found; but where the consideration is expressly

stated, that, and that only, can be considered at having received the sanction of the legislative judgment.

But not only is the construction for which we have contended the only one which can be given to the terms of the act, it is, moreover, the only view that could have been taken of the situation as it actually existed when this act was passed. It is impossible that a contract such as that contended for by counsel for the Water Company could have been made. Counsel contend that the State considered it to be its duty as a State to furnish water for fire protection to the city of Louisville free of charge; and that in order to perform this obligation to the city the State contracted with the Louisville Water Company, as a private corporation, to perform this service, and agreed, in consideration therefor, to exempt it from taxation.

The foundation of this argument is the State's *obligation to the city*, and its desire to satisfy that obligation by doing something which would be of benefit to the city. But if the city owned the Water Company, then a payment to the Water Company by the city was but a payment to itself, a payment from one of its funds into another of its funds, and to be relieved from this was of no benefit to the city and could not be any discharge of the State's obligation to the city.

But it is said that this Water Company is owned by the Sinking Fund of the city of Louisville; that this is a separate corporation, the funds of which are charged with the payment of certain specified creditors of the city; and that it makes a great difference if the city ceases to pay the Water Company for water, for thus the funds of the Sinking Fund are reduced. But to whom does this make a difference? The difference is solely to the creditors of the city. The creditors whose debts are charged on the sinking Fund may suffer (unless some compensation be otherwise made), while the general creditors may gain; but the city, which is liable to all of its creditors, neither gains nor loses one cent of its estate by a transfer of money from one of its funds to another of its funds.

But, as the alleged obligation of the State which it is said now to be seeking to fulfill is an obligation *to the city*, it must, in order to fulfill this obligation do something which is of benefit to the city. And as relieving the city from the necessity of

paying out one of its funds into another of its funds could not be of any benefit to the city, therefore this could not have been of any consideration for the State's action. Under such circumstances the only thing the State could do to benefit the city, and thus fulfill the State's obligation to the city, would be to relieve the city's property from taxation. And this release of its property from taxation was the sole benefit received by the city from the State; while the stopping of payments from the general fund to the Sinking Fund was of no benefit to the city, but was merely an evening up of the two funds, making some compensation to the general fund out of the Sinking Fund for the new increase in the assets of the Sinking Fund derived from the exemption of this property from taxation.

We say, therefore, that it conclusively appears from the terms of the act of the legislature that it attempted to exempt this property because it was the property of the city of Louisville, and not on the idea that it was exempting the property of a private corporation in consideration of its performing a duty which the State owed to the city; and that this is consistent with the view which the legislature had taken of this matter and upon which it had acted for nearly half a century before the act of 1882 was passed. And we say further, that it conclusively appears from a consideration of the facts of the case, that that which the State by the first section of the act of 1882 ordered to be done, to wit, that water should be furnished by the Louisville Water Company to the city of Louisville for fire protection free of charge, was no benefit or gain whatever to the city, and therefore could not have been considered by the State as any performance of its obligation to the city, and consequently could not have been any consideration for the State's granting an exemption from taxation to the Louisville Water Company.

And we call attention to the fact that this is the view which has been taken of this act by the Court of Appeals of Kentucky, a tribunal which is of course familiar with all of the parties to this transaction, and fully understands the relation which they bear to each other. Even Judge Pryor, the dissenting judge, says in his dissenting opinion that he has no doubt that the ownership of the stock of the Louisville Water Company by the city of Louisville was the inducement to the exemption; and

again says that he considers the tax-payers of Louisville as the real parties to this controversy. In other words, he bases his dissent on what he conceives to be an injustice to the tax-payers of Louisville, and not upon any idea of a violation of the contract rights of the Louisville Water Company. (Record, 38.)

Now, if we have satisfied the court that our view of this act is correct and that it is simply an attempt to exempt certain property from taxation because it is the property of a city, and that it is not a contract between the State and a private corporation, then of course we have shown that there is no ground for this court to take jurisdiction of the case. State judges might differ, and they did differ on the final decision of this case on the question of whether or not the fact of the city's ownership of the property, acquired as it was and held as it was, constituted a valid ground of exemption from State taxation. But this is solely a question for the State courts to determine; and having done this, though by a division among the judges, we do not see how this court can revise that determination.

IV.

The Act of Exemption, if a Contract, was not Valid.

But if the court still differs with us in all of the conclusions we have heretofore reached, and considers that the act of 1882 is, in form at least, a contract between the State and the Water Company, then the remaining question is as to its validity.

As heretofore explained, the argument of plaintiff in error as to the alleged contract is, that it was a govermental duty of the State to furnish water for fire protection to the city of Louisville *free of charge*, and that it contracted with this Water Company to perform this service for it in consideration of an exemption from taxation. Of course, therefore, if it was not in fact the duty of the State to furnish such free water, then the furnishing of it by either the State or an agency of the State was not a public service, and there was no consideration for the attempted exemption, and it was and is void.

It is to be observed that it can not be claimed that furnishing

water to the individual citizens of Louisville was the consideration for the exemption; for the charter of the Water Company had been granted in which this duty had been imposed, and its works had been constructed, and it had been furnishing water to the city and to its citizens (for which they paid) for many years before this act of exemption of 1882 was passed. But it is alleged, and the argument simply is, that to furnish water for fire protection *free of charge* to the city of Louisville was the consideration for the exemption. Therefore the question of whether or not this alleged contract was valid turns on the question of whether or not it is the governmental duty of the State of Kentucky to furnish water *free of charge* to its cities for fire protection.

We, of course, are familiar with the cases of New Orleans Gas Company v. Louisiana Light Company, New Orleans Waterworks v. Rivers, and Louisville Gas Company v. Citizens Gas Company, all decided by this court at the same time and reported in 115 U. S., pages 650, 674, and 683, in which this court held that the furnishing of gas or water to the citizens of New Orleans and the furnishing of gas to the citizens of Louisville, by means of pipes and mains laid through the public streets, were franchises belonging to the States of Louisiana and Kentucky, and that the services performed in consideration of the grants of such franchises were of a public nature. (115 U. S. 692.)

In elaborating this proposition in the New Orleans Waterworks case the court said:

"The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the State which she could grant to such persons or corporations, and upon such terms as she deemed best for the public interest. And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property." (115 U. S. 681.)

But in the case of the present appellant, the Louisville Water Company, "the right to dig up and use the streets (of Louisville)

for the purpose of placing pipes and mains to supply the city and its inhabitants with water" was not acquired by the act of 1882, nor was the duty of furnishing water to the city or its inhabitants imposed by this act. These reciprocal rights and duties had existed for many years before this act was passed, and are not now called in question. These matters were fixed, as heretofore shown in our statement, by the charter of the company, which became a law on March 6, 1854. (2 Acts, 1853–4, p. 121, appendix, p. 7). That act provided that the persons therein designated should constitute a corporation "with power and authority to construct and establish within the city of Louisville or elsewhere for the purpose of supplying said city and its inhabitants with water." (Section 1.) It further provided that the corporation might acquire and hold in fee-simple, or for any less estate, any lands necessary for the convenient management of its concerns, and that it might acquire by purchase or condemnation the right to lay its pipes and aqueducts through any lands through which it might be necessary to lay the same. (Section 4.) It further provides that the corporation should have the right to take water from the Ohio River or any other stream, and "may lay its pipes or aqueducts under or over any railroad, street, or wharf, but the same shall be done in such manner as not to obstruct or impede the passage thereon." (Section 5.) And again it provided:

"In the laying and construction of the pipes and aqueducts in the city of Louisville, the same shall be so laid and constructed that an abundant supply of water can be drawn therefrom for the extinguishment of fires; and *said corporation shall furnish water to the city of Louisville for the extinguishment of fires and cleaning streets upon such terms as may be agreed between it and the authorities of said city;* and it shall have the exclusive right to furnish water to the inhabitants of said city by means of pipes or aqueducts, if the authorities of said city shall agree thereto, and upon such terms and for such time as may be agreed." (Section 6.).

And the act further provides that the price of water furnished to the city of Louisville should not exceed the price charged in Pittsburgh, Cincinnati, and St. Louis. (Section 11.)

Thus we see that by the charter of the company granted in 1854 the right was acquired to use the public highways for the

introduction of water into the city. And the duty was imposed of furnishing water to the city and its inhabitants, special mention being made of the duty to furnish water to the city for the extinguishment of fires and cleansing of streets at a price to be agreed upon between the city and the Water Company. And these rights were exercised by the laying of the pipes through the streets, and these duties were performed by furnishing water to the city and its inhabitants, at prices paid to the company by the city and its inhabitants, for many years prior to 1882. The act of 1882, therefore, did not give the right to use the streets; that had been given before. It did not fix on the Water Company the duty of furnishing water either to the inhabitants of the city or to the city for fire protection or otherwise; that had been done before. All it did was to require that *no charge should be made for the water which was already required to be furnished to the city for fire protection.* In other words, the right to the use of the streets having previously been granted and the supply of the water having previously been secured, and the city having for many years paid for the water thus supplied, the State undertook by the act of 1882 to *give* to the city of Louisville, *as a donation*, the money which it had been theretofore paying for this water; and in order to do this the State agreed to pay the Water Company to furnish this water free of charge to the city. Such is the most favorable construction for the Water Company that can be placed upon this act.

This is the act the validity of which is attacked, and which has been held unconstitutional by the Court of Appeals of Kentucky. And we do not believe that any such act has ever been upheld by this court.

Was it any part of the duty of the State of Kentucky to furnish water *free of charge* to the city of Louisville for fire protection? Did it have any constitutional right or power to do so at the expense of the whole State? The proceeding can not be defended on the idea of the necessity of securing a supply of water for a great city or its inhabitants, for that had already been secured, and all the city had to do was to pay for the water which was offered to it, as it had been doing for many years before, and as all the other cities in the State are doing to-day. This gift to the city of Louisville was a pure gratuity. It was

contrary to what had been the State's course for twenty-eight years with reference to water furnished by this particular company, and it was contrary to what had been the State's course with reference to this particular city for forty-eight years. For, as we have shown, an act was passed in 1838 providing for the establishment of a gas and water company, which was to furnish water to the city for fire protection *at prices to be agreed on between it and the city* (Acts, 1837–8, p. 206), though this statute was never taken advantage of. And it was contrary to what had been the course of the State during its whole existence in its treatment of other cities. A number of cities in Kentucky are supplied with water by water-works, yet they are left to pay for the water they get, and the water-works, as we have heretofore shown by an extract from the General Statutes, are taxed by the State of Kentucky. If there is any other exception to this rule, it is some isolated case where an attempt has been made to secure some exceptional favor similar to that conferred by this act. We know of but one, the Newport Water-works, and that act has been declared unconstitutional by the Court of Appeals. (Commonwealth of Kentucky v. McKibben, 12 Ky. Law Reporter, 474.) Nor is this general taxation of water companies a new feature of the tax laws introduced by the present revenue statute of 1886, but, as we have heretofore mentioned, all such property, since the General Statutes of Kentucky were adopted in 1873, has been assessed and taxed according to a particular mode therein provided (the mode having been changed once or twice during the period mentioned); and prior to the adoption of the General Statutes such property, as it was not specially exempted, was assessed and taxed as all other property. This long and uniform course of legislation shows, beyond a doubt, that the State of Kentucky has never considered it to be its duty to furnish water to its cities for fire protection free of charge.

Furthermore, the Court of Appeals of Kentucky, prior to the decision of the present case, had held in effect that protection from fire in a city is not a governmental duty of the State. In the case of The City of Louisville against The Commonwealth of Kentucky, 1 Duvall, 295, the court held that a municipal corporation is of a dual nature, partly commercial and partly governmental in its character; and that such property as

fire engines and engine houses are held by it in its commercial and not in its governmental character. And this case has been expressly approved in Commonwealth v. McKibben, 12 Ky. Law Reporter, 474, where the court, without dissent, held that an act exempting the Newport Water-works (which belonged to the city of Newport) from taxation was unconstitutional.

Furthermore, if it might be considered in some States a duty of the State to furnish water for fire protection free of charge to its cities, yet that can not be said to be the case with the State of Kentucky, when we observe not only the manner in which it treated the subject for fifty years with reference to the city of Louisville, but when we further observe the manner in which it has always treated the subject with reference to the other cities within its borders. If it be claimed that the State suddenly awoke in 1882 to a sense of its duty to furnish water for fire protection to the city of Louisville free of charge, yet it has never awakened to a sense of any such obligation with reference to the other of its cities. On its General Statutes has been standing for nearly twenty years a law providing generally for the assessment and taxation of all water companies, and nowhere is there to be found any law requiring them to furnish water free of charge to any of the cities in the State; and nowhere is there to be found any law providing for giving assistance to any other city of the State in the matter of furnishing water for protection from fire. If there is such a law, it ought to appear in the General Statutes; but in vain will it be sought for; and, as we find no such law as that, but on the contrary find a general law taxing all water-works, we know that the State furnishes no free water to its other cities, but leaves them to pay for the water they get, while it exacts the payment of taxes from water-works that supply them with water. Henderson, Paducah, Owensboro, Lexington, Frankfort, and other cities pay for the water they get, and the water companies which furnish it in turn pay taxes to the State, and the State out of the public treasury pays for the water furnished to the city of Louisville, which is best able of all the cities in the State to pay for the water it needs. Surely this is not just, and we do not believe it is within the constitutional power of the State to make this discrimination between its cities,

and to make this gratuitous payment out of the public funds for the benefit of the city of Louisville.

As we have suggested above, even if it should be conceded that in some States it might be the duty of the State to furnish water for fire protection to ALL of its cities free of charge, yet where a State, as in Kentucky's case, has taken a different view of this matter, and has refused to recognize or perform any such duty, though having within its borders a number of cities that need water, then surely to furnish water to one particular city at the expense of all the rest is a violation of a provision in the Constitution of such a State which declares: "That all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community but in consideration of public services." (Constitution of Kentucky, Art. 13, Sec. 1.)

The service of furnishing water for the city of Louisville is just the same as is required for other cities.

The Court of Appeals of Kentucky, in a number of cases, has denounced as unconstitutional acts of the legislature which have granted to special individuals rights denied to the community. Where a certain corporation was given the right to charge ten per cent on loans, while the general law forbade more than six, the court held this unconstitutional. (Gordon v. Winchester, 12 Bush, 110; Henderson Building and Loan Association v. Johnson, 88 Ky. 191.) And where the statutory time for collecting officers' fee bills was extended in favor of one particular clerk of one county, the court held this unconstitutional. (80 Ky. 608.) Again, where a certain corporation was given the power to sell land conveyed to it in trust for creditors without the intervention of judicial proceeding when there was a general statute forbidding this, the special statute was held unconstitutional. (Kentucky Trust Co. v. Lewis, 82 Ky. 579.)

It is to be observed that in each of these cases just cited, if the statute had not been contrary to the general law of the State, or in other words, if the statute itself had been a general statute, it would have been held valid, yet because it was special, making a statutory favorite of one person or corporation, it was held unconstitutional.

Therefore, giving the act of 1882 the construction for which

counsel for appellant contend, to wit, a form of contract whereby the State agreed to exempt the property of the Louisville Water Company from taxation in consideration of its furnishing water to the city of Louisville for fire protection *free of charge*, and remembering that the right to enter upon and dig up the streets and lay water-pipes therein for this purpose had been granted long before that date, and that the duty of furnishing this water had been fixed long before that date, and that for many years the city of Louisville had been paying for the water thus furnished, and that all the other cities of the State are still left to pay for the water they get, we say, remembering all these things, the act of 1882, even according to appellant's construction, was on its face a clear gratuity, at the expense of the public treasury of the State, to the city of Louisville, was an unauthorized appropriation of public funds, and was therefore unconstitutional and void.

Therefore, for the foregoing reasons, we ask that the writ of error herein be dismissed on the ground that the court has no jurisdiction to try the case; and if the court considers that it has jurisdiction, then that the judgment of the Court of Appeals of Kentucky be affirmed.

Respectfully,

JAMES P. HELM,
HELM BRUCE,
Counsel for Defendant in Error.

APPENDIX

CONTAINING LEGISLATIVE ACTS, OR EXTRACTS THEREFROM, REFERRED TO IN THIS BRIEF.

APPENDIX.

"An Act to Incorporate the Louisville Gas and Water Company." Approved February 15, 1838. (Acts, 1837–38, p. 206.)

* * * * * * * * * *

SEC. 6. That it shall be the duty of said company, within three years after its organization, to erect and establish in the city of Louisville a gas manufactory of sufficient extent and capacity to supply the city of Louisville and the citizens thereof with all such public and private lights as may from time to time be required; and, within five years after the establishment of gas-works, to erect and establish water-works of sufficient extent and capacity to supply the city of Louisville with water for the extinguishment of fires, and the cleansing and sprinkling the streets and alleys, and also to afford the citizens thereof a sufficient supply for all manufacturing and domestic purposes: *Provided*, That water-works shall not be established until the citizens of Louisville, at a public meeting called by the mayor and council for the purpose, shall consent thereto: *And, provided further*, That if the citizens of Louisville shall not consent to the establishment of water-works as provided in this act, then the corporate powers for that purpose shall cease, and the shares of stock shall be reduced to fifty dollars each, instead of one hundred dollars, and so as to reduce the capital of the company one half.

* * * * * * * * * *

SEC. 9. The price of water to the city of Louisville, for the extinguishment of fires and for the cleansing and sprinkling streets, alleys, etc., shall be agreed upon, annually, by the company and the city authorities; and the company shall be bound to furnish the same at a price not exceeding ten per cent on the whole costs of the works, to be paid quarterly: *Provided*, That

if the rents to individuals will more than pay the cost of raising the water and the expenses of superintendence, that the excess be deducted from the ten per cent until the cost to the city shall be reduced to three per cent.

SEC. 10. That the company have the exclusive privilege of erecting, establishing, and constructing gas- and water-works in the city, during this charter, and of vending gas-lights and supplying the city and citizens with water by means of public works.

SEC. 11. That to enable the company to construct and establish gas- and water-works in the city of Louisville, it is authorized to lay down and extend pipes and conductors through any of the streets and alleys of the city, and for that purpose to take up the pavements and to replace the same, and shall be responsible to the city for any damage which may arise therefrom, or any unreasonable delay in replacing the same; and said company shall be subject to the regulations of the city as to the streets and alleys, and to the same ordinances and penalties that individuals may be subject to.

"An Act to authorize and enable the City of Louisville to erect Water-works." Approved January 32, 1842. (Acts, 1841-2, p. 139.)

SEC. 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the city of Louisville be and it is empowered to borrow not exceeding two hundred thousand dollars, at a rate of interest not exceeding eight per cent per annum, and upon a credit of not more than thirty years, the interest to be paid half yearly at Louisville, or either of the Atlantic cities. And the better to enable said city to borrow the money necessary for the erection of water-works, it is empowered to secure the payment of the principal and interest of any sum or sums borrowed by the hypothecation of any real estate owned by the city, and also the net proceeds of such water-works when made. The city council shall also, from time to time, levy a tax upon the taxable property within the city, adequate to the payment of the

interest upon any sum borrowed, or so proposed to be borrowed, to be designated and collected as and by the name of Water Tax; which, as collected, shall from time to time be paid over by the city collectors to the treasurer of the board of superintendence hereinafter named. No tax so levied shall ever thereafter be repealed so long as the money so borrowed shall remain unpaid, nor shall the avails thereof be directed to any other purpose.

SEC. 2. The said city is authorized to construct suitable water-works, whether within or without its limits, for the abundant supply of all public, domestic, and manufacturing purposes; and to procure, by purchase or otherwise, the necessary site or sites for such works, not exceeding twenty acres of ground, together with the necessary rights of way for conduits or pipes, either below or above the surface, together with the right of ingress or egress necessary to keeping them in repair; and if such sites or rights of way as may be selected and needed can not be procured by purchase, the same, at the instance of the city, may be condemned for the public use aforesaid, by application to the Jefferson Circuit Court by appropriate proceedings, in the nature of writs of *ad quod damnum*, the assessed value of the property or right of way being first paid, or tendered in court, for the use of the owners before final condemnation.

SEC. 3. The superintendence of the erection, keeping, and repairing, together with the financial affairs, and all other matters pertaining to such works, shall be placed under the immediate control and management of a board, to consist of a superintendent and four managers, to be annually appointed by the city council, and who shall retain their situations till successors are appointed. The superintendent to receive an adequate salary, not exceeding two thousand dollars per annum; one of the managers to be designated by the council as treasurer, with an adequate salary, who shall give bond with sufficient security to the city for the faithful discharge of his duties, and into whose hands all moneys shall be immediately paid, borrowed or otherwise raised or collected, for the use of the works.

SEC. 4. The board of superintendence shall from time to time, once in every year, establish a scale of prices at which the use of water shall be let, from year to year; and every tenant shall be deemed to continue to let, from year to year, at such rate, what-

ever it may be, unless the board be notified to the contrary at least one month prior to the expiration of every current year: *Provided*, The city council may control the scale of rates, if thereby the annual net proceeds of the works are not reduced below what may be necessary to pay the interest on any sum remaining unpaid of what may have been borrowed for their erection: *And provided*, That after the completion of the works, and their extension to all suitable points throughout the city, within the discretion of the council, the assessments shall be so regulated as not to produce a net annual revenue exceeding ten per cent on the cost; all surplus, after paying the interest on the money borrowed, shall be half yearly paid into the city treasury.

SEC. 5. The board of superintendence may annually appoint a collector, with an allowance of adequate commission, who shall give bond with sufficient surety to the city for the faithful discharge of his duties; whose duty it shall be to collect all water rents or sue for the same, in the name of the city, before any appropriate tribunal, and recover the same by summary proceedings after five days' notice; he shall make weekly returns of and pay to the treasurer all sums collected. In case of default on his part, or that of the treasurer, the city may, by like proceedings after like notice, sue either and his securities upon his official bond.

SEC. 6. The city may pass by-laws, with penalties not exceeding ten dollars, to protect the works and its water from willful or negligent injury; or where any person shall willfully attempt to render the water used for said works impure or insalubrious, or shall willfully injure or damage any of said works, he or she may be proceeded against by indictment, and punished at the discretion of a jury, by fine not exceeding one thousand dollars, and imprisonment not exceeding one year.

"An Act for the Benefit of Common Schools in the town of Portland." Approved February 29, 1848. (Acts, 1847–8, p. 405.)

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SEC. 4. Be it further enacted, that it shall be lawful for the city of Louisville to contract with the Louisville Gas Company, upon such terms and conditions as the two corporations shall mutually agree upon, for the construction, by the Louisville Gas Company, of water-works for supplying the city and citizens of Louisville with water.

City Charter of 1851, Art. 7, Sec. 12.

SEC. 12. The general council shall have power to establish, build, and regulate water-works for the city of Louisville; but no ordinance passed for such purpose shall take effect until the same shall have been approved by a majority of the votes of the qualified voters of the said city voting thereon at a general election for officers of said city. And all acts and parts of acts heretofore passed upon the subject of water-works for the city of Louisville are hereby repealed.

CHARTER OF THE LOUISVILLE WATER COMPANY.

"An Act to incorporate the Louisville Water Company." Approved March 6, 1854. (2 Acts, 1853–4, p. 121.)

1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That Thomas E. Wilson, Bland Ballard, John R. Hamilton, Charles J. Clarke, Andrew Graham, and Curran Pope, their associates and successors, are hereby made a corporation, by the name of the Louisville Water Company, with power and authority to construct and establish within the

city of Louisville or elsewhere for the purpose of supplying said city and its inhabitants with water.

2. The capital stock of said corporation shall consist of not more than ten thousand shares, and no assessment shall be laid thereon of a greater amount in the whole than one hundred dollars upon each share. Said corporation may issue its bonds for such amount as it may find necessary, payable in not more than thirty years from their issue, and sell the same at such discount as they may deem advisable, and secure the same by a mortgage of the lands and water rents.

3. The affairs of said corporation shall be managed by six directors and a president, who shall be stockholders in the corporation, and a majority of the directors shall be citizens of Kentucky. The directors shall be annually chosen by the stockholders, at such a time and place as may be designated by the by-laws of the corporation. The directors may fill vacancies in their own board, and appoint a president from among the stockholders or directors, and such other officers and agents as may be required to conduct the business of the corporation. The directors shall hold their office until their successors are elected, and a majority of them shall constitute a quorum. At all elections the stockholders may vote in person or by proxy authorized in writing, and each share shall be entitled to one vote.

4. The said corporation may purchase, take, and hold in fee-simple, or for any less estate, any lands necessary for the objects of this act, and for the convenient management of the concerns of the corporation, and may acquire the right to lay their pipes and aqueducts through any land through which it may be necessary to lay the same, and to repair the same when necessary, and may erect and establish such buildings, engines, machinery, and reservoirs as may be required for the purposes aforesaid. If the proprietors of any lands which said corporation may need for any of the purposes aforesaid, or the right of way through which the corporation may require for laying its pipes and aqueducts, do not agree with the company the price to be paid therefor, the company may acquire such land or right of way by a writ of *ad quod damnum*, in the same manner that turnpike road companies are authorized to do by the 103d chapter of the Revised Statutes, which took effect on the 1st of July, 1852.

5. The corporation is hereby authorized and empowered to take water from the Ohio River, or any other stream or place, and may lay its pipes or aqueducts under or over any railroad, canal, highway, street, or wharf; but the same shall be done in such manner as not to obstruct or impede the passage thereon. In laying its pipes or aqueducts across or through any highway or street, and in repairing such pipes and aqueducts from time to time, said corporation shall not unnecessarily obstruct such highway or street; and in every case of the removal of any earth or pavement in any such highway or street, the said corporation shall cause the earth to be replaced and the pavement to be laid new, so that such highway or street shall be in as good condition as the same was before such removal.

6. In the laying and construction of the pipes and aqueducts in the city of Louisville, the same shall be so laid and constructed that an abundant supply of water can be drawn therefrom for the extinguishment of fires; and said corporation shall furnish water to the city of Louisville for the extinguishment of fires and cleaning streets upon such terms as may be agreed between it and the authorities of said city; and it shall have the exclusive right to furnish water to the inhabitants of said city, by means of pipes or aqueducts, if the authorities of said city shall agree thereto, and upon such terms and for such time as may be agreed.

7. The said corporation is hereby empowered to sell the privilege of using the water which may be conducted through its pipes or aqueducts to any corporation or person, and the said corporation may make all reasonable rules and regulations as to the manner and the times in which said water may be taken and used.

8. The city of Louisville may at any time purchase of the said corporation its franchise and all its personal and real property, by paying therefor such a sum as, together with its receipts, will reimburse the whole amount expended, with an annual interest of ten per cent; and from and after the execution of the conveyance the said city of Louisville shall have all the right and be subject to all the duties in this act expressed as to said corporation.

9. If any person shall willfully and maliciously defile, corrupt, or make impure any water used by said corporation, or

destroy or injure any pipe, aqueduct, machinery, or other property of said corporation, such person and all who shall aid or abet therein shall forfeit to the use of said corporation treble the amount of damages caused thereby, and shall be liable to a fine of not exceeding one thousand dollars, or to imprisonment in the work-house of Louisville for not exceeding one year.

10. This act shall be void if the city authorities of Louisville shall provide by ordinance for the construction of said water-works as authorized by an act approved the 24th day of March, 1851, entitled an act to charter the city of Louisville, and such ordinance shall be approved by a majority of the qualified voters of said city voting for or against the same on or before the first Monday in July, 1854, and said council shall, within four months thereafter, provide to carry such ordinance into effect, by contracting or causing contracts to be made for the said works; and said votes may be taken on such day as the said council may designate by resolution; but such ordinance and resolution shall be published in at least two newspapers printed in Louisville at least ten days before the voting; and the city may raise the money necessary to the construction of said water-works by issuing and selling her bonds, having thirty years to run, and secured by a pledge of the water rents.

11. That the price of water furnished by said company to the city of Louisville shall not exceed the average price charged in the cities of Pittsburgh, Cincinnati, and St. Louis; and the company hereby incorporated shall complete said water-works in three years from the date hereof; otherwise this charter shall be forfeited.

"An Act to amend the Charter of the Louisville Water Company." Approved February 28, 1867. (2 Acts, 1867, p. 167.)

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That the act incorporating the Louisville Water Company and the act amendatory thereof be and the same are hereby amended so as to increase the capital stock of said company

fifteen thousand shares, in addition to the stock now authorized to be subscribed.

2. That the directors of said company shall not receive subscriptions for said additional stock, or any part thereof, until the general council of the city of Louisville shall have given their consent to the same, by ordinance or resolution, on such terms and conditions as the general council shall prescribe.

3. That the said city of Louisville, in its corporate capacity, shall have and is hereby invested with right and power to take and subscribe for said stock, or any part thereof, by ordinance or resolution of the general council, and to pay for the stock on such terms as the directors of said company and the city may agree. The said city shall have authority, and power is hereby granted, by ordinance or resolution of the general council, to issue and sell the bonds of said city, payable in not less than twenty nor more than thirty years from their date, in denominations of one thousaud dollars each, with coupons attached thereto, payable semi-annually, bearing interest of not less than six nor more than seven and three tenths per cent per annum; which bonds, when so issued, may be paid and delivered to said Louisville Water Company in payment of any stock thus subscribed by said city.

4. That it shall be lawful for said Louisville Water Company to issue the bonds of said company in denominations of one thousand dollars each, payable in not less than twenty nor more than thirty years, with coupons attached thereto, bearing interest of not less than six nor more than seven and three tenths per cent per annum, payable semi-annually, and may execute a mortgage on the property and income of said company for the payment of the same.

5. That this act shall take effect and be in full force from and after its passage.

"An Act to establish the Boundaries and Taxable Limits, and to amend the Charter of the City of Louisville." Approved March 9, 1867. (2 Acts, 1867, p. 417.)

SEC. 10. The general council shall have no power to pass ordinances or resolutions to diminish the present resources of the sinking fund of said city as now established, until the debts of said city, now or hereafter charged or chargeable upon said fund, are paid, but may pass laws to increase said resources; and the whole resources of said fund from year to year shall be sacredly set apart and applied to the payment of the interest and principal of the city's debts chargeable on said fund, and to no other use or purpose, until the whole of the debts of the city are fully paid and satisfied, including the present and any future indebtedness of the city. The mayor, the president of the board of aldermen for the time being, and three persons to be chosen by the general council on joint ballots, as hereinafter directed, and their successors in office, shall constitute the "Commissioners of the Sinking Fund of the City of Louisville," and by that name shall have corporate powers and existence, may sue and be sued, and do and perform all things necessary to execute the duties required and powers given them by this act. They shall elect one of their number president of the board; may fill vacancies; have and use a common seal, or act without such seal; and pass all necessary and proper rules and by-laws for their government and the officers and employees of said board, and for the safety, control, and application of said sinking fund, not inconsistent with the objects with which said fund is or was set apart, or to this act or the general laws of this State. The said commissioners, other than the mayor and president of the board of aldermen, shall be chosen for the term of three years, and until their successors shall have qualified, except as herein provided. One of the commissioners, chosen at the first election after this act goes into effect, shall hold his office for one year, one for two years, and the other for three years; and the general council, at the said first election, shall determine the respective terms of said commissioners. No

one who is either alderman, councilman, or officer of said city shall be eligible for said office of commissioner, to be elected by the general council, and who does not possess the qualifications required for the office of councilman by the charter of said city. The treasurer of said city shall be the treasurer of said commissioners of said fund, and his bond as treasurer of said city shall bind him and his securities thereto for the safe keeping of all money, property, securities, bonds, evidences of debt, or other valuable thing belonging to said fund which is in his possession, or may hereafter come to his hands or under his control. The said commissioners shall severally execute his covenant, with good security, to be approved by the general council to the city of Louisville, faithfully to execute the duties required by this act, and to account for said fund which may come to his hands under his control; and orders upon said fund shall be made by a majority of said board, entered upon the records of their proceedings of said board, and a copy thereof certified by the secretary of said board, and signed by the president, and countersigned by the secretary, and made payable to the person or corporation entitled thereto, or to the person who, by an order of said board, is authorized to receive the amount of such order, to pay any debt or interest chargeable upon said fund, payable in another State or city in the United States or Europe. The treasurer of said city shall be secretary of said board, and shall keep a true and faithful record of its proceedings, acts, orders, and doings, which shall be subject at all times to the inspection of the mayor and any member or committee of the general council. The said treasurer and his sureties shall be liable, on his official bond, for his acts as secretary of said board. The funds, estate, and income belonging now or hereafter to said fund, shall be and is vested in, and be under the control and management of said board of commissioners for the purposes herein declared; if injured, withheld, or abstracted, said board of commissioners may sue for and recover the same, or any part thereof, in their corporate name. The said commissioners shall apply said fund to the payment of the said city's debt chargeable on the same, when they can do so on fair terms; but whenever there shall be a surplus of said funds, which can not be applied on fair terms to the extinguishment of the said liabilities of said city, the said com-

missioners may invest the same in bonds of said city, or for which it is bound, or bonds of the State of Kentucky, or in such good and solvent stocks as shall be approved by a vote of the majority of each board elect of general council, by yeas and nays. The commissioners shall require monthly detailed statements from said treasurer of the condition of said funds, which said commissioners shall cause to be transmitted each month to the board of common councilmen; and on the first Monday in January of each year the treasurer shall furnish to the general council a full detailed statement of the said fund, its receipts and disbursements for the preceding year, and shall exhibit to the general council the evidences of payment made by the orders of said commissioners out of said fund. The said commissoners may be removed from office for malfeasance or misfeasance by the board of common council, on charges preferred by the board of alderment, in the same manner the mayor is subject to removal by the board of aldermen. Any person having charge, control, or possession of the said sinking fund, or any part thereof, or any of its property, money, or evidences of property or stocks or other valuable thing, shall willfully embezzle or misapply the same, or any part thereof, shall be deemed guilty of felony, and on conviction thereof shall be confined in the jail and penitentiary of this State not less than one nor more than twenty years, at the discretion of a jury. The general council may, by ordinance, allow a fair and reasonable compensation to said commissioners, the mayor excepted, who shall not receive any additional compensation beyond his salary as mayor; and said treasurer may be allowed, by the general council, additional pay for the services required of him by this act.

"An Act to increase the Resources of the Sinking Fund of the City of Louisville." Approved March 15, 1869. (2 Acts, 1869, p. 462.)

SEC. 1. There shall be added to the present resources of the sinking fund of said city the stock owned by her in the "Louisville Water Works Company," also an annual tax on each one hundred dollars' worth of such real and personal prop-

erty as may be taxed for city purposes in said city, to be levied and collected in cash as herein provided.

Present Charter of Louisville, granted in 1870.

SEC. 98. The water-works, as an institution of the city, shall remain as now established by law; but the general council shall not take further stock in the company without an ordinance first passed for that purpose, declaring therein the amount to be taken, how to be paid, and the tax necessary to be levied on the water district to meet the same as now required by law to be levied; and cause such ordinance to be submitted to the qualified voters of said city for approval or rejection at a general election, or special one appointed for that purpose, to be provided in said ordinance, after ten days' public notice through all the daily newspapers published in said city. But no tax or water rent shall be levied or assessed for the purpose of paying for the use of water for public purposes, or for paying the expense of conducting and managing the works, except upon the lands and tenements in the water district.

"An Act to amend an act, entitled 'An Act establishing a New Charter for the City of Louisville,'" Approved the 3d day of March, 1871. (1 Acts, 1871, p. 323.)

SEC. 9. That the commissioners of the sinking fund of said city shall have power to purchase from the city of Louisville, or individuals holding same, the certificates of stock held by said city or said individuals in the Louisville Water Company; and when so purchased, shall be held by said commissioners as part of the sinking fund of said city; and that section ninety-eight of said act be so amended as to authorize said city by said company, at the regular prices charged under the contract hereafter made between said parties in relation thereto, as if section ninety-eight of said charter had not been enacted; and so far as said section is in conflict with this act the same is hereby repealed.

"An Act to further increase the Resources of the Sinking Fund of the City of Louisville." Approved March 21, 1871. (2 Acts, 1871.)

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SEC. 3. That the commissioners of the sinking fund of said city be and are hereby authorized to purchase from the city of Louisville the stock in the Louisville Water Company which said city has purchased of individual stockholders, upon such terms as may be agreed upon between the parties.

"An Act to amend the Charter of the Louisville Water Company." Approved April 22, 1882. (2d Acts, 1881, 915.)

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1. That it shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire-plugs or hydrants of the city of Louisville for fire protection free of charge.

2. The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal, and special.

3. This act shall take effect from and after its passage.

OLD CHAPTER 92 OF GENERAL STATUTES AS ADOPTED IN 1873.

ARTICLE I.

Rate of Taxation.

Sec. 1. An annual tax of forty-five cents upon each one hundred dollars of value of the real and personal estate directed to be assessed for taxation, due and payable the year assessed, shall be paid by the owner or persons assessed—twenty cents thereof for the ordinary expenses of government, five cents thereof for the use of the sinking fund, and twenty cents for the support of common schools.

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Property Exempt.

Sec. 3. The property mentioned in this section shall be exempt from all taxation, viz: Cattle of the value of fifty dollars, the growing crop on land listed for taxation, articles manufactured in the family for family use, all poultry raised for family use, and the provisions on hand for family use; and the real estate and investments devoted to public schools, seminaries, universities, colleges, court-houses, clerk's offices, jails, public graveyards, lunatic, orphan, and deaf and dumb asylums, hospitals, infirmaries, widows' and orphans' asylums, foundling asylums, and real estate not exceeding five acres, from which no rent, profit, dividend, or income is received or promised, belonging to incorporated lodges of Free Masons, or incorporated lodges of Odd Fellows, or incorporated lodges of Knights of Pythias. Property belonging to any city or town, which is necessary to carrying on the government of such city or town, viz: police court house, mayor's offices, including offices for the various city or town officers in said buildings, fire engine houses, engine and horses belonging thereto, work-houses, alms-houses, hospitals, pest-houses, together with the grounds belonging thereto, the real estate not exceeding five acres, and investments devoted to churches; also

the property of the United States used for custom-houses, post-offices, docks, ship-yards, forts, arsenals, or barracks, and United States bonds, except the interest arising on said bonds, which shall be liable under the residuary clause of this act; also, all the property of negroes, mulattoes, and Indians is exempt from the tax for the support of common schools.

Property Taxed.

Sec. 4. Property shall be listed for taxation, as of the 10th of January of each year, by the assessor, as follows:

1. Land and town lots, or any interest therein, including life estates and leases, for a term having two years or more to run, all to be listed in the county where situated.

2. Horses, mares, mules, jacks, and jennets.

3. Cattle.

4. Gold, silver, and other metallic watches, clocks composed in whole or part of metal or wood, gold and silver plate, pianos, riding or pleasure carriages, buggies, gigs, sulkies, stage coaches, omnibuses, and all descriptions of vehicles for the transportation of persons or passengers, by whatever name known or called, including the harness thereof, whether in use or not; but such of the above named property as is kept for sale in the shop or store of a manufacturer thereof, or store of a merchant, shall be listed as stores and merchandise are required to be listed.

Sec. 5. The assessor, after having taken the lists of all property required to be listed, as above, shall require each person, on oath, to fix the amount he or she is worth from all other sources on the day to which said list relates, after taking out his or her indebtedness from said amount. And the said assessor shall take from the said amount so assessed and listed the sum of one hundred dollars, and set down and list the balance for taxation. This section includes all property not exempt from taxation, other than that mentioned in section four, whether manufactured, produced, purchased, or otherwise procured, such as spirituous liquors and all mixtures thereof, the produce of mines, farms, forests, and other productions of the earth, manufactured articles of all kinds, and all property of every sort and description, notes, accounts, bonds, bills of exchange, and choses in actions,

debts, and demands of every kind; but does not include lands or other property not within this State, subject by law to tax, and actually taxed by the State or county where situated, nor bank or other stocks when the bank or other institution or corporation in which it is held is required to pay tax on the same.

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ARTICLE XII.

Railroads, Turnpike Roads, and other Corporations, Tax on.

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Sec. 4. It shall be the duty of the president, treasurer, or secretary of any gas or water company or association in this State to report, under oath, to the Auditor of Public Accounts, on or before the 10th day of July every year, a full and complete statement of all property, real, personal, or mixed, including buildings, engines, machinery, pipes above and below ground, reservoirs, retorts, tanks, meters, lamp-posts, together with any and all other species of property connected with or in any way belonging to or under the control of such gas or water company, and any surplus accumulated, or contingent fund on hand, cash on hand, stocks, bonds, or other securities, and the total cash value thereof.

Sec. 5. It shall be the duty of the president, treasurer, secretary, mayor, or agent of any toll-bridge company, incorporated city, mining or other incorporated or manufacturing company, gas or water company or association, in or doing business in this State, under or by virtue of any act of incorporation named in this article, to pay into the treasury, on or before the 10th day of October in each year, a tax upon each one hundred dollars of the value of the property owned, possessed, held, or represented by such company, city, or association, equivalent to the tax collected upon real estate.

"An Act to amend the Revenue Laws." Approved April 22, 1884. (Acts of 1883–4, p. 70.)

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. That hereafter all corporations in this Commonwealth, except railroad and turnpike companies, shall, in the manner provided by article twelve, chapter ninety-two, of the General Statutes, list their property with the assessor of the county in which the corporate property is situated.

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SEC. 3. Upon the failure or refusal of any corporation, by its proper officer, to comply with the provisions hereof, it shall be the duty of the assessor to list the property of said corporation for taxation at its fair cash value, and it shall be the duty of the sheriff to collect said taxes as now provided by law with reference to other taxes.

PRESENT CHAPTER 92 OF GENERAL STATUTES, ADOPTED MAY 17, 1886.

ARTICLE 1.

Rate of Taxation.

Sec. 1. That an annual tax of forty-seven cents upon each one hundred dollars of value of all real and personal estate, directed to be assessed for taxation, due and payable the fiscal year assessed, shall be paid by the owner or persons assessed. The aggregate amount of tax realized by all assessments shall be distributed as follows: Twenty cents for the ordinary expenses of the government, five cents for the use of the sinking fund, and twenty-two cents for the support of common schools (b).

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Sec. 3. All property, real and personal, within this State, not herein expressly exempt by law, shall be assessed, as nearly as practicable, according to a uniform rate, in the manner hereinafter provided.

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Property Exempt.

Sec. 9. The following property shall be exempt from taxation:

1. Property of the United States and the securities thereof which are, by act of Congress, exempt from taxation.

2. Property of Commonwealth.

3. Cattle of value of fifty dollars; all crops that are raised in the year in which the assessment is made; articles manufactured in the family for family use; all poultry raised for family use, and the provisions on hand for family use.

4. Property owned in its entirety by counties, cities, and towns, which is necessary to carry on the government of such county, city or town (a).

5. Public schools, churches, and all property of seminaries, asylums, hospitals, infirmaries, and colleges, and all other funds devoted to charitable purposes, and church parsonages, public cemeteries, except those owned by joint stock companies or associations which declare a dividend (b): *Provided*, That nothing herein shall be construed as exempting any property which is used or employed for gain of any person, nor any property of which the products, rents, or uses are not devoted solely to the objects of the institution, as contradistinguished from personal gain of the individuals connected with the institutions: *Provided*, Nothing herein shall be construed or held to include any house, lot, land, fund, or other property of any insurance or assurance company. Libraries, paintings, and statuary owned by counties, cities and towns, are likewise exempt from taxation.

6. All property which is maintained by general State taxation.

Property Taxed.

Sec. 10. Real estate or any interest therein shall be listed in the county and tax district where situated against the owner of the first freehold estate therein. If the owner fails to list the same, the assessor shall nevertheless list all lands in his county; and, to enable him to ascertain the person in whose name to make the list, he is empowered to swear witnesses and compel them to testify, and their statements must be put in writing and returned with the tax book, and a note or reference made to the proof in the listing of the land.

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Sec. 12. Personal property (a) of every kind shall be separately stated and valued in the appropriate columns of the tax book herein provided; and if there be no column appropriate, it shall be stated and valued in the column headed Miscellany. The assessor, after having taken list of all property required to be listed as above, shall require each person, on oath, to affix the amount he or she is worth from all other sources on the day to which said list relates, after taking out his or her indebtedness from said amount (9b). But in estimating his indebtness no account shall be taken of debts contracted as surety or guarantor